TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

This title was enacted by act June 25, 1948, ch. 645, 62 Stat. 683

PART II.—CRIMINAL PROCEDURE

Chap. Sec.
208. Speedy Trial 3161

AMENDMENTS

1975—Pub. L. 93–619, title I, § 102, Jan. 3, 1975, 88 Stat. 2086, added chapter 208.

PART I.—CRIMES

Chapter 1.—GENERAL PROVISIONS

TRANSFER OF FUNCTIONS.

The Bureau of Narcotics and Dangerous Drugs, including the office of Director thereof, in the Department of Justice, referred to in Ex. Ord. No. 11534, was abolished by Reorg. Plan No. 2 of 1973, eff. July 1, 1973, 38 F.R. 15932, 87 Stat. 1091, set out in the Appendix to Title 5, Government Organization and Employees. Reorg. Plan No. 2 of 1973 also created in the Department of Justice a single, comprehensive agency for the enforcement of drug laws to be known as the Drug Enforcement Administration, empowered the Attorney General to authorize the performance by officers, employees, and agencies of the Department of functions transferred to him, and directed the Attorney General to coordinate all drug law enforcement functions to assure maximum cooperation between the Drug Enforcement Administration, the Federal Bureau of Investigation, and the other units of the Department of Justice involved in drug law enforcement.

§ 1. Offenses classified.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3156, 3172 of this title.

§ 2. Principals.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1962 of this title; title 49 section 1473.

Chapter 3.—ANIMALS, BIRDS, FISH, AND PLANTS

§ 44. Marking packages or containers.

Whoever ships, transports, carries, brings or conveys in interstate or foreign commerce any package containing any wild mammal, wild bird, amphibian, or reptile, or any mollusk or crustacean, or the dead body or parts or eggs thereof, without plainly marking, labeling, or tagging such package with the names and addresses of the shipper and consignee and with an accurate statement showing the contents by number and kind; or

* * * * *

CODIFICATION

The first paragraph of this section is set out in this Supplement to correct a typographical error, which correction was made by substituting "parts or eggs thereof" for "parts of eggs thereof".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3054, 3112 of this title.

Chapter 7.—ASSAULT

Sec.
112. Protection of foreign officials and official guests.

AMENDMENTS

1972—Pub. L. 92–539, title III, § 302, Oct. 24, 1972, 86 Stat. 1073, substituted "Protection of foreign officials and official guests" for "Assaulting certain foreign diplomatic and other official personnel" in item 112.

§ 112. Protection of foreign officials and official guests.

(a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official or official guest shall be fined not more than $5,000, or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

(b) Whoever willfully intimidates, coerces, threatens, or harasses a foreign official or an official guest, or willfully obstructs a foreign official in the performance of his duties, shall be fined not more than $500, or imprisoned not more than six months, or both.

(c) Whoever within the United States but outside the District of Columbia and within one hundred feet of any building or premises belonging to or used or occupied by a foreign government or by a foreign official for diplomatic or consular purposes, or as a mission to an international organization, or as a residence of a foreign official, or belonging to or used or occupied by an international organization for official business or residential purposes, publicly—

(1) parades, pickets, displays any flag, banner, sign, placard, or device, or utters any word, phrase, sound, or noise, for the purpose of intimidating, coercing, threatening, or harassing any foreign official or obstructing him in the performance of his duties, or

(2) congregates with two or more other persons with the intent to perform any of the aforesaid acts or to violate subsection (a) or (b) of this section,

shall be fined not more than $500, or imprisoned not more than six months, or both.

(d) For the purpose of this section "foreign official", "foreign government", "international organization", and "official guest" shall have the same meanings as those provided in sections 1116 (b) and (c) of this title.

(e) Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States. (As amended Oct. 24, 1972, Pub. L. 92–539, title III, § 301, 86 Stat. 1072.)

AMENDMENTS

1972—Subsec. (a). Pub. L. 92–539 substituted "Protection of foreign officials and official guests" for "Assaulting certain foreign diplomatic and other official personnel" in the section catchline, designated existing provisions as subsec. (a) and, in subsec. (a) as so designated, substituted "a foreign official or official guest" for "the person of a head of foreign state or foreign government, foreign minister, ambassador or other public minister" and "act" for "acts".

Subsecs. (b)–(e). Pub. L. 92–539 added subsecs. (b)–(e).

SHORT TITLE

Section 1 of Pub. L. 92–539 provided: "That this Act [enacting sections 970, 1116 and 1117 of this title, amending this section and section 1201 of this title, and enacting provisions set out as notes under this section] may be cited as the 'Act for the Protection of Foreign Officials and Official Guests of the United States'."

CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY

Section 2 of Pub. L. 92–539 provided that:

"The Congress recognizes that from the beginning of our history as a nation, the police power to investigate, prosecute, and punish common crimes such as murder, kidnaping, and assault has resided in the several States, and that such power should remain with the States.

"The Congress finds, however, that harassment, intimidation, obstruction, coercion, and acts of violence committed against foreign officials or their family members in the United States or against official guests of the United States adversely affect the foreign relations of the United States.

"Accordingly, this legislation is intended to afford the United States jurisdiction concurrent with that of the several States to proceed against those who by such acts interfere with its conduct of foreign affairs."

FEDERAL PREEMPTION

Section 3 of Pub. L. 92–539 provided: "Nothing contained in this Act [enacting sections 970, 1116 and 1117 of this title, amending this section and section 1201 of this title, and enacting provisions set out as notes under this section] shall be construed to indicate an intent on the part of Congress to occupy the field in which its provisions operate to the exclusion of the laws of any State, Commonwealth, territory, possession, or the District of Columbia on the same subject matter, nor to relieve any person of any obligation imposed by any law of any State, Commonwealth, territory, possession, or the District of Columbia."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 section 2667.

Chapter 9.—BANKRUPTCY

§ 152. Concealment of assets; false oaths and claims; bribery.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 15 sections 78o, 80b–3.

Chapter 11.—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 15 section 1942.

§ 201. Bribery of public officials and witnesses.

(a) For the purpose of this section:

* * * * *

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

* * * * *

CODIFICATION

Provisions of subsec. (a) of this section have been set out in this Supplement to correct a typographical error.

EX. ORD. NO. 11222. STANDARDS OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

Ex. Ord. No. 11222, May 8, 1965, 30 F.R. 6469, as amended by Ex. Ord No. 11590, Apr. 23, 1971, 36 F.R. 7831, provided:

By virtue of the authority vested in me by Section 301 of Title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

* * * * *

SEC. 706. This Order shall be applicable to the United States Postal Service established by the Postal Reorganization Act of 1970 [Title 39, Postal Service].

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 1961, 2516 of this title; title 12 section 1457.

§ 202. Definitions.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 16 section 984.

§§ 205, 207.

SECTIONS REFERRED TO IN OTHER SECTIONS

These sections are referred to in title 25 section 4501.

§ 208. Acts affecting a personal financial interest.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 15 section 763.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in section 1–828 of the District of Columbia Code.

§ 224. Bribery in sporting contests.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1961 of this title.

Chapter 12.—CIVIL DISORDERS

§ 232. Definitions.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 49 sections 1472, 1806.

Chapter 15.—CLAIMS AND SERVICES IN MATTERS AFFECTING GOVERNMENT

§ 292. Solicitation of employment and receipt of unapproved fees concerning Federal employees' compensation.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in sections 31–1603, 31–1623, 36–502 of the District of Columbia Code.

Chapter 18.—CONGRESSIONAL ASSASSINATION, KIDNAPING, AND ASSAULT

§ 351. Congressional assassination, kidnaping, and assault; penalties.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2516 of this title.

Chapter 19.—CONSPIRACY

§ 371. Conspiracy to commit offense or to defraud United States.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 42 section 3793.

Chapter 25.—COUNTERFEITING AND FORGERY

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 15 sections 78o, 80b–3.

§§ 471 to 473.

SECTIONS REFERRED TO IN OTHER SECTIONS

These sections are referred to in section 1961 of this title.

§ 500. Money orders.

Whoever, with intent to defraud, falsely makes, forges, counterfeits, engraves, or prints any order in imitation of or purporting to be a blank money order or a money order issued by or under the direction of the Post Office Department or Postal Service; or

Whoever forges or counterfeits the signature or initials of any person authorized to issue money orders upon or to any money order, postal note, or blank therefor provided or issued by or under the direction of the Post Office Department or Postal Service, or post office department or corporation of any foreign country, and payable in the United States, or any material signature or indorsement thereon, or any material signature to any receipt or certificate of identification thereof; or

Whoever falsely alters, in any material respect, any such money order or postal note; or

Whoever, with intent to defraud, passes, utters or publishes or attempts to pass, utter or publish any such forged or altered money order or postal note, knowing any material initials, signature, stamp impression or indorsement thereon to be false, forged, or counterfeited, or any material alteration therein to have been falsely made; or

Whoever issues any money order or postal note without having previously received or paid the full amount of money payable therefor, with the purpose of fraudulently obtaining or receiving, or fraudulently enabling any other person, either directly or indirectly, to obtain or receive from the United States or Postal Service, or any officer, employee, or agent thereof, any sum of money whatever; or

Whoever embezzles, steals, or knowingly converts to his own use or to the use of another, or without authority converts or disposes of any blank money order form provided by or under the authority of the Post Office Department or Postal Service; or

Whoever receives or possesses any such money order form with the intent to convert it to his own use or gain or use or gain of another knowing it to have been embezzled, stolen or converted; or

Whoever, with intent to defraud the United States, the Postal Service, or any person, transmits, presents, or causes to be transmitted or presented, any money order or postal note knowing the same—

(1) to contain any forged or counterfeited signature, initials, or any stamped impression, or

(2) to contain any material alteration therein unlawfully made, or

(3) to have been unlawfully issued without previous payment of the amount required to be paid upon such issue, or

(4) to have been stamped without lawful authority; or

Whoever steals, or with intend to defraud or without being lawfully authorized by the Post Office Department or Postal Service, receives, possesses, disposes of or attempts to dispose of any postal money order machine or any stamp, tool, or instrument specifically designed to be used in preparing or filling out the blanks on postal money order forms—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. (As amended Sept. 23, 1972, Pub. L. 92–430, 86 Stat. 722.)

AMENDMENTS

1972—Pub. L. 92–430 substituted "a blank money order or a money order issued by or under the direction of" for "a money order issued by" and struck out ", or by any officer or employee thereof" in the first par.; substituted "or initials of any person authorized to issue money orders" for "of any officer or employee of the Postal Service," in the second par.; inserted "or attempts to pass, utter or publish" preceding "any such forged" and substituted "material initials, signature, stamp impression" for "material signature" in the fourth par.; inserted "or Postal Service" following "the United States" in the fifth par.; added sixth and seventh pars.; inserted ", the Postal Service" following "the United States", and substituted "presents, or causes to be transmitted or presented, any money order" for "or presents to any officer or employee, or at any office of the United States, any money order" and designated material following "knowing the same" as cls. (1)–(3) with minor changes and added cl. (4) in eighth par.; added ninth par., and enacted provisions of former seventh par. as tenth par.

Chapter 27.—CUSTOMS

§ 545. Smuggling goods into the United States.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 31 section 1034.

Chapter 29.—ELECTIONS AND POLITICAL ACTIVITIES

Sec.
608. Limitations on contributions and expenditures.
609. Repealed.
611. Contributions by Government contractors.
613. Contributions by foreign nationals.
614. Prohibition of contributions in name of another.
615. Limitation on contributions of currency.
616. Acceptance of excessive honorariums.
617. Fraudulent misrepresentation of campaign authority.

AMENDMENTS

1974—Pub. L. 93–443, title I, § 101(d)(4)(B), (f)(3), Oct. 15, 1974, 88 Stat. 1267, 1268, substituted in item 613 "Contributions by foreign nationals" for "Contributions by agents of foreign principals", and added items 614 to 617.

1972—Pub. L. 92–225, title II, § 207, Feb. 7, 1972, 86 Stat. 11, substituted "contributions and expenditures" for "political contributions and purchases" in item 608, "Repealed" for "Maximum contributions and expenditures" in item 609, and "Government contractors" for "firms or individuals contracting with the United States" in item 611.

CROSS REFERENCES

Penalties for violations, see section 441 of Title 2, The Congress.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 2 section 437g.

§ 591. Definitions.

Except as otherwise specifically provided, when used in this section and in sections 597, 599, 600, 602, 608, 610, 611, 614, 615, and 617 of this title—

(a) "election" means (1) a general, special, primary, or runoff election, (2) a convention or caucus of a political party held to nominate a candidate, (3) a primary election held for the selection of delegates to a national nominating convention of a political party, or (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President;

(b) "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall

be deemed to seek nomination for election, or election, to Federal office, if he has (1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, or (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

(c) "Federal office" means the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

(d) "political committee" means any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

(e) "contribution"—

(1) means a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business, which shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance thereof that each endorser or guarantor bears to the total number of endorsers or guarantors), made for the purpose of influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for such purposes;

(3) means funds received by a political committee which are transferred to such committee from another political committee or other source;

(4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose; but

(5) does not include—

(A) the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee;

(B) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;

(C) the sale of any food or beverage by a vendor for use in a candidate's campaign at a charge less than the normal comparable charge, if such charge for use in a candidate's campaign is at least equal to the cost of such food or beverage to the vendor;

(D) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate, or

(E) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines or other similar types of general public political advertising;

to the extent that the cumulative value of activities by any person on behalf of any candidate under each of clauses (B), (C), and (D) does not exceed $500 with respect to any election;

(f) "expenditure"—

(1) means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

(3) means the transfer of funds by a political committee to another political committee; but

(4) does not include—

(A) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(B) nonpartisan activity designed to encourage individuals to register to vote or to vote;

(C) any communication by any membership organization or corporation to its members or stockholders, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to Federal office;

(D) the use of real or personal property and the cost of invitations, food, and beverages, voluntarily provided by an individual to a

candidate in rendering voluntary personal services on the individual's residential premises for candidate-related activities;

(E) any unreimbursed payment for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate;

(F) any communication by any person which is not made for the purpose of influencing the nomination for election, or election, of any person to Federal office;

(G) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply in the case of costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines or other similar types of general public political advertising;

(H) any costs incurred by a candidate in connection with the solicitation of contributions by such candidate, except that this clause shall not apply with respect to costs incurred by a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 608(c) of this title; or

(I) any costs incurred by a political committee (as such term is defined by section 608 (b) (2) of this title) with respect to the solicitation of contributions to such political committee or to any general political fund controlled by such political committee, except that this clause shall not apply to exempt costs incurred with respect to the solicitation of contributions to any such political committee made through broadcasting stations, newspapers, magazines, outdoor advertising facilities, and other similar types of general public political advertising;

to the extent that the cumulative value of activities by any individual on behalf of any candidate under each of clauses (D) or (E) does not exceed $500 with respect to any election;

(g) "person" and "whoever" mean an individual, partnership, committee, association, corporation, or any other organization or group of persons;

(h) "State" means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States; and

(i) "political party" means any association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization;

(j) "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Federal Election Commission;

(k) "national committee" means the organization which, by virtue of the bylaws of the political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Federal Election Commission established under section 310(a) of the Federal Election Campaign Act of 1971; and

(*l*) "principal campaign committee" means the principal campaign committee designated by a candidate under section 302(f)(1) of the Federal Election Campaign Act of 1971.

(As amended Feb. 7, 1972, Pub. L. 92–225, title II, § 201, 86 Stat. 8; Oct. 15, 1974, Pub. L. 93–443, title I, §§ 101(f)(2), 102, 88 Stat. 1268, 1269.)

REFERENCES IN TEXT

Section 310(a) of the Federal Election Campaign Act of 1971, referred to in subsec. (k), is classified to section 437c(a) of Title 2, The Congress.

Section 302(f)(1) of the Federal Elections Campaign Act of 1971, referred to in subsec. (*l*), is classified 432(f)(1) of Title 2.

AMENDMENTS

1974—Pub. L. 93–443, § 101(f)(2), in introductory text, inserted "Except as otherwise specifically provided," and references to sections 614, 615, and 617 of this title.

Subsec. (a). Pub. L. 93–443, § 102(a), deleted cl. (5) which included in the definition of "election", the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States.

Subsec. (d). Pub. L. 93–443, § 102(b), inserted reference to "club," preceding "association", deleted reference to "individual," preceding "committee" and substituted "other group of persons" and "receives" for "organization" and "accepts".

Subsec. (e). Pub. L. 93–443, § 102(c), transferred the word "means" following introductory word "contribution" to become the initial word in pars. (1) to (4); in par. (1), inserted parenthetical text ", which shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance thereof that each endorser or guarantor bears to the total number of endorsers or guarantors" following "course of business", substituted "or for the purpose of influencing the results of a primary" for ", for the purpose of influencing the results of a primary" and "President of the United States" for "President" and deleted end text reading ", or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States"; substituted in par. (3) "funds received by a political committee which are transferred to such committee from another political committee or other source" for "transfer of funds between political committees"; substituted in par. (4) "but" for "and"; and incorporated existing par. (5) in provisions designated as subpar. (A) of par. (5) and added subpars. (B) to (D) thereto.

Subsec. (f). Pub. L. 93–443, § 102(d), transferred the word "means" following introductory word "expenditure" to become the initial word in pars. (1) to (3); in par. (1), substituted "or for the purpose of influencing the results of a primary" for ", for the purpose of influencing the result of a primary" and "President of the United States" for "President" and deleted end text reading ", or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States"; substituted in par. (3) "the transfer of funds by a political committee to another political committee; but" for "a transfer of funds between political committees;"; and added par. (4).

Subsecs. (i) to (*l*). Pub. L. 93–443, § 102(e), added subsecs. (i) to (*l*).

1972—Pub. L. 92–225, in opening text, inserted reference to sections 600, 608, and 611, and eliminated reference to section 609 of this title.

Subsec. (a). Pub. L. 92–225 substituted provision redefining "election" and designated as subsec. (a) for prior provision stating that " 'election' includes a general or special election, but does not include a primary election or convention of a political party".

Subsec. (b). Pub. L. 92–225 substituted provision redefining "candidate" and designated as subsec. (b) for prior provision stating that " 'candidate' means an individual whose name is presented for election as Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, whether or not such individual is elected".

Subsec. (c). Pub. L. 92–225 added provisions defining "Federal office".

Subsec. (d). Pub. L. 92–225 substituted provision redefining "political committee" and designated as subsec. (d) for prior provision stating that " 'political committee' includes any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors (1) in two or more States, or (2) whether or not more than one State if such committee, association, or organization (other than a duly organized State or local committee of a political party) is a branch or subsidiary of a national committee, association or organization".

Subsec. (e). Pub. L. 92–225 substituted provision redefining "contribution" and designated as subsec. (e) for prior provision stating that " 'contribution' includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable".

Subsec. (f). Pub. L. 92–225 substituted provision redefining "expenditure" and designated as subsec. (f) for prior provision stating that " 'expenditure' includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and includes a contract, promise, or agreement to make an expenditure, whether or not legally enforceable".

Subsec. (g). Pub. L. 92–225 incorporated provision defining "person" and "whoever" in provision designated as subsec. (g).

Subsec. (h). Pub. L. 92–225 designated provision defining "State" as subsec. (h) and specifically included in the definition "each State of the United States" and "the Commonwealth of Puerto Rico".

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–443 effective Jan. 1, 1975, see section 410(a) of Pub. L. 93–443, set out as a note under section 431 of Title 2, The Congress.

EFFECTIVE DATE OF 1972 AMENDMENT

Amendment by Pub. L. 92–225 effective on Dec. 31, 1971, or sixty days after Feb. 7, 1972, whichever is later, see section 406 of Pub. L. 92–225, set out as a note under section 431 of Title 2, The Congress.

STATE LAWS AFFECTED; DEFINITIONS

Section 104 of Pub. L. 93–443 provided that:

"(a) The provisions of chapter 29 of title 18, United States Code [this chapter], relating to elections and political activities, supersede and preempt any provision of State law with respect to election to Federal office.

"(b) For purposes of this section, the terms 'election', 'Federal office', and 'State' have the meanings given them by section 591 of title 18, United States Code [this section]."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 608 of this title.

§§ 597, 599.

SECTIONS REFERRED TO IN D.C. CODE

These sections are referred to in section 1–292 of the District of Columbia Code.

§ 600. Promise of employment or other benefit for political activity.

Whoever, directly or indirectly, promises any employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, shall be fined not more than $1,000 or imprisoned not more than one year, or both. (As amended Feb. 7, 1972, Pub. L. 92–225, title II, § 202, 86 Stat. 9.)

AMENDMENTS

1972—Pub. L. 92–225 deleted reference to "work," following "position,", inserted reference to "contract, appointment," following "compensation," and to "or any special consideration in obtaining any such benefit," following "Act of Congress,", and substituted "in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office" for "in any election".

EFFECTIVE DATE OF 1972 AMENDMENT

Amendment by Pub. L. 92–225 effective on Dec. 31, 1971, or sixty days after Feb. 7, 1972, whichever is later, see section 406 of Pub. L. 92–225, set out as a note under section 431 of Title 2, The Congress.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 591 of this title.

§ 602. Solicitation of political contributions.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 29 section 928.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in section 1–292 of the District of Columbia Code.

§ 608. Limitations on contributions and expenditures.

(a) (1) No candidate may make expenditures from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year for nomination for election, or for election, to Federal office in excess of, in the aggregate—

(A) $50,000, in the case of a candidate for the office of President or Vice President of the United States;

(B) $35,000, in the case of a candidate for the office of Senator or for the office of Representative from a State which is entitled to only one Representative; or

(C) $25,000, in the case of a candidate for the office of Representative, or Delegate or Resident Commissioner, in any other State.

For purposes of this paragraph, any expenditure made in a year other than the calendar year in which the election is held with respect to which such expenditure was made, is considered to be made during the calendar year in which such election is held.

(2) For purposes of this subsection, "immediate family" means a candidate's spouse, and any child,

parent, grandparent, brother, or sister of the candidate, and the spouses of such persons.

(3) No candidate or his immediate family may make loans or advances from their personal funds in connection with his campaign for nomination for election, or for election, to Federal office unless such loan or advance is evidenced by a written instrument fully disclosing the terms and conditions of such loan or advance.

(4) For purposes of this subsection, any such loan or advance shall be included in computing the total amount of such expenditures only to the extent of the balance of such loan or advance outstanding and unpaid.

(b)(1) Except as otherwise provided by paragraphs (2) and (3), no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.

(2) No political committee (other than a principal campaign committee) shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $5,000. Contributions by the national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States shall not exceed the limitation imposed by the preceding sentence with respect to any other candidate for Federal office. For purposes of this paragraph, the term "political committee" means an organization registered as a political committee under section 303 of the Federal Election Campaign Act of 1971 for a period of not less than 6 months which has received contributions from more than 50 persons and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made in a year other than the calendar year in which the election is held with respect to which such contribution was made, is considered to be made during the calendar year in which such election is held.

(4) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate, in writing, to accept contributions on his behalf shall be considered to be contributions made to such candidate; and

(B) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(5) The limitations imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(6) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(c)(1) No candidate shall make expenditures in excess of—

(A) $10,000,000, in the case of a candidate for nomination for election to the office of President of the United States, except that the aggregate of expenditures under this subparagraph in any one State shall not exceed twice the expenditure limitation applicable in such State to a candidate for nomination for election to the office of Senator, Delegate, or Resident Commissioner, as the case may be;

(B) $20,000,000, in the case of a candidate for election to the office of President of the United States;

(C) in the case of any campaign for nomination for election by a candidate for the office of Senator or by a candidate for the office of Representative from a State which is entitled to only one Representative, the greater of—

(i) 8 cents multiplied by the voting age population of the State (as certified under subsection (g)); or

(ii) $100,000;

(D) in the case of any campaign for election by a candidate for the office of Senator or by a candidate for the office of Representative from a State which is entitled to only one Representative, the greater of—

(i) 12 cents multiplied by the voting age population of the State (as certified under subsection (g)); or

(ii) $150,000;

(E) $70,000, in the case of any campaign for nomination for election, or for election, by a candidate for the office of Representative in any other State, Delegate from the District of Columbia, or Resident Commissioner; or

(F) $15,000, in the case of any campaign for nomination for election, or for election, by a candidate for the office of Delegate from Guam or the Virgin Islands.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a Vice Presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for the purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the

candidate, or an agent of the candidate, to make the expenditure.

(3) The limitations imposed by subparagraphs (C) (D), (E), and (F) of paragraph (1) of this subsection shall apply separately with respect to each election.

(4) The Commission shall prescribe rules under which any expenditure by a candidate for Presidential nomination for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(d)(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the per centum difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (c) and subsection (f) shall be increased by such per centum difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year 1974.

(e)(1) No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c)(2)(B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

(2) For purposes of paragraph (1)—

(A) "clearly identified" means—

(i) the candidate's name appears;

(ii) a photograph or drawing of the candidate appears; or

(iii)) the identity of the candidate is apparent by unamibiguous reference; and

(B) "expenditure" does not include any payment made or incurred by a corporation or a labor organization which, under the provisions of the last paragraph of section 610, would not constitute an expenditure by such corporation or labor organization.

(f)(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (g)). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (g)); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(g) During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(h) No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(i) Any person who violates any provision of this section shall be fined not more than $25,000 or imprisoned not more than one year, or both. (As amended Feb. 7, 1972, Pub. L. 92–225, title II, § 203, 86 Stat. 9; Oct. 15, 1974, Pub. L. 93–443, title I, § 101 (a), (b), 88 Stat. 1263, 1266.)

REFERENCES IN TEXT

Section 303 of the Federal Election Campaign Act of 1971, referred to in subsec. (b)(2), is classified to section 433 of Title 2, The Congress.

AMENDMENTS

1974—Subsec. (a)(1). Pub. L. 93–443, § 101(b)(1), in the introductory text, substituted "campaigns" for "campaign" and inserted phrases "during any calendar year" and "in the aggregate"; made subpar. (B) applicable to a candidate for the office of Representative from a State which is entitled to only one Representative; substituted in subpar. (C) ", in any other case" for "to the Congress"; and added provision respecting calendar year expenditures.

Subsecs. (a)(3), (4). Pub. L. 93–443, § 101(b)(2), added pars. (3) and (4).

Subsec. (b). Pub. L. 93–443, § 101(a), added subsec. (b). Former subsec. (b) redesignated (h).

Subsec. (c). Pub. L. 93–443, § 101(a), added subsec. (c). Former subsec. (c) redesignated (i).

Subsecs. (d) to (g). Pub. L. 93–443, § 101(a), added subsecs. (d) to (g).

Subsec. (h). Pub. L. 93–443, § 101(a), redesignated former subsec. (b) as (h), substituted "make" for "authorize" in first sentence, and added second sentence prohibition against acceptance of contributions or the making of expenditures by any officer or employee of a political committee.

Subsec. (i). Pub. L. 93–443, § 101(a), redesignated former subsec. (c) as (i) and increased the limitation on fines to $25,000 from $1,000.

1972—Pub. L. 92–225 substituted "contributions and expenditures" for "political contributions and purchases" in section catchline.

Subsec. (a). Pub. L. 92–225 substituted provisions prohibiting expenditures in excess of $50,000; $35,000; and $25,000 of candidates for office of President or Vice President, office of Senator, and office of Representative, Delegate, or Resident Commissioner and defining "immediate family" for former provisions prohibiting political contributions in excess of $5,000 to any candidate for elective Federal office, including the office of President, Presidential and Vice-Presidential electors, or any political committee or other political organization engaged in advancing the nomination or election of any candidate for any such office or success of any national political party and making the prohibition inapplicable to contributions made to a State or local committee or other State or local organization or to similar bodies in the District of Columbia, any Territory, or Possession.

Subsec. (b). Pub. L. 92–225 substituted provision prohibiting any candidate or political committee from knowingly accepting any contribution or authorizing any expenditure in violation of provisions of this section for former provisions prescribing maximum penalty of $5,000 fine or five year prison term, or both, for purchases of goods, commodities, advertising, or articles, the proceeds of which inures to benefit of any candidate for elective Federal office, including the office of President, Presidential and Vice-Presidential electors, or any political committee or other political organization engaged in advancing the nomination or election of any candidate for any such office or success of any national political party and prohibting any interference with business, trade, or profession of any candidate.

Subsec. (c). Pub. L. 92–225 substituted provisions prescribing penalties for violations of section for former provisions for punishment of officers, directors, and managing heads of a partnership, committee, association, corporation, or other organization or group of persons for knowingly and willfully participating in violations of this section.

Subsec. (d). Pub. L. 92–225 struck out provision defining term "contribution", now covered by section 591(e) of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–443 effective Jan. 1, 1975, see section 410(a) of Pub. L. 93–443, set out as a note under section 431 of Title 2, The Congress.

EFFECTIVE DATE OF 1972 AMENDMENT

Amendment by Pub. L. 92–225 effective on Dec. 31, 1971, or sixty days after Feb. 7, 1972, whichever is later, see section 406 of Pub. L. 92–225, set out as a note under section 431 of Title 2, The Congress.

PERSONAL FUNDS FOR EXPENDITURE ON OUTSTANDING DEBTS OR OBLIGATIONS (OCT. 15, 1974) INCURRED BEFORE JAN. 1, 1973, FOR CAMPAIGN FOR ELECTION TO FEDERAL OFFICE

Section 101(c) of Pub. L. 93–443 provided that:

"(a)(1) Notwithstanding section 608(a)(1) of title 18, United States Code [subsec. (a)(1) of this section], relating to limitations on expenditures from personal funds, any individual may satisfy or discharge, out of his personal funds or the personal funds of his immediate family, any debt or obligation which is outstanding on the date of the enactment of this Act [Oct. 15, 1974] and which was incurred by him or on his behalf by any political committee in connection with any camaign ending before the close of December 31, 1972, for election to Federal office.

"(2) For purposes of this subsection—

"(A) the terms 'election', 'Federal office', and 'political committee' have the meanings given them by section 591 of title 18, United States Code; and

"(B) the term 'immediate family' has the meaning given it by section 608(a)(2) of title 18, United States Code."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 591 of this title; title 2 sections 437c, 437d, 437f, 437g, 437h, 455; title 26 sections 9004, 9008, 9034, 9035.

§ 609. Repealed. Pub. L. 92–225, title II, § 204, Feb. 7, 1972, 86 Stat. 10.

Section, act June 25, 1948, ch. 645, 62 Stat. 723, prescribed maximum contributions and expenditures limitation of $3,000,000 for any calendar year.

EFFECTIVE DATE OF REPEAL

Section repealed effective on Dec. 31, 1971, or sixty days after Feb. 7, 1972, whichever is later, see section 406 of Pub. L. 92–225, set out as a note under section 431 of Title 2, The Congress.

§ 610. Contributions or expenditures by national banks, corporations or labor organizations.

* * * * *

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $25,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $50,000 or imprisoned not more than two years, or both.

* * * * *

As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided*, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of

membership in a labor organization or as a condition of employment, or by monies obtained in any commerical transaction. (As amended Feb. 7, 1972, Pub. L. 92–225, title II, § 205, 86 Stat. 10; Oct. 15, 1974, Pub. L. 93–443, title I, § 101(e)(1), 88 Stat. 1267.)

AMENDMENTS

1974—Pub. L. 93–443 increased penalty for violations and willful violations to $25,000 and $50,000 from $5,000 and $10,000, respectively.

1972—Pub. L. 92–225 added paragraph defining "contribution or expenditure" and making it unlawful for the separate segregated fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal, or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–443 effective Jan. 1, 1975, see section 410(a) of Pub. L. 93–443, set out as a note under section 431 of Title 2, The Congress.

EFFECTIVE DATE OF 1972 AMENDMENT

Amendment by Pub. L. 92–225 effective on Dec. 31, 1971, or sixty days after Feb. 7, 1972, whichever is later, see section 406 of Pub. L. 92–225, set out as a note under section 431 of Title 2, The Congress.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 591, 608, 611 of this title; title 2 sections 431, 437c, 437d, 437f, 437g, 437h, 455; title 26 section 527.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in sections 1–292, 1–1161 of the District of Columbia Code.

§ 611. Contributions by Government contractors.

Whoever—

(a) entering into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of (1) the completion of performance under, or (2) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land or buildings, directly or indirectly makes any contribution of money or other thing of value, or promises expressly or impliedly to make any such contribution, to any political party, committee, or candidate for public office or to any person for any political purpose or use: or

(b) knowingly solicits any such contribution from any such person for any such purpose during any such period;

shall be fined not more than $25,000 or imprisoned not more than five years, or both.

This section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any separate segregated fund by any corporation or labor organization for the purpose of influencing the nomination for election, or election, of any person to Federal office, unless the provisions of section 610 of this title prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, such fund.

For purposes of this section, the term "labor organization" has the meaning given it by section 610 of this title. (As amended Feb. 7, 1972, Pub. L. 92–225, title II, § 206, 86 Stat. 10; Oct. 15, 1974, Pub. L. 93–443, title I, §§ 101(e)(2), 103, 88 Stat. 1267, 1272.)

AMENDMENTS

1974—Pub. L. 93–443 increased penalty for violations to $25,000 from $5,000 and added provisions authorizing establishment, administration or solicitation of contributions to a separate segregated fund for purpose of influencing the nomination for election or election of a person to Federal office unless prohibited by section 610 of this title and defining "labor organization".

1972—Pub. L. 92–225 substituted "Government contractors" for "firms or individuals contracting with the United States" in section catchline, incorporated existing provisions in provisions designated as cl. (a), substituted in cl. (a) "at any time between the commencement of negotiations for and the later of (1) the completion of performance under, or (2) the termination of negotiations for, such contract" for "during the period of negotiation for, or performance under such contract", incorporated existing provisions in provisions designated as cl. (b), and deleted in cl. (b) "or firm" following "such person".

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–443 effective Jan. 1, 1975, see section 410(a) of Pub. L. 93–443, set out as a note under section 431 of Title 2, The Congress.

EFFECTIVE DATE OF 1972 AMENDMENT

Amendment by Pub. L. 92–225 effective on Dec. 31, 1971, or sixty days after Feb. 7, 1972, whichever is later, see section 406 of Pub. L. 92–225, set out as a note under section 431 of Title 2, The Congress.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 591 of this title; title 2 sections 437c, 437d, 437f, 437g, 437h, 455.

§ 613. Contributions by foreign nationals.

Whoever, being a foreign national directly or through any other person, knowingly makes any contribution of money or other thing of value, or promises expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or

Whoever knowingly solicits, accepts, or receives any such contribution from any such foreign national—

Shall be fined not more than $25,000 or imprisoned not more than five years or both.

As used in this section, the term "foreign national" means—

(1) a foreign principal, as such term is defined by section 1(b) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611(b)), except that the term "foreign national" shall not include any individual who is a citizen of the United States; or

(2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)).

(As amended Pub. L. 93–443, title I, § 101(d)(1)–(4)(A), (e)(3), Oct. 15, 1974, 88 Stat. 1267.)

AMENDMENTS

1974—Pub. L. 93–443 substituted in heading "foreign nationals" for "agents of foreign principals" and in first par. "a foreign national" for "an agent of a foreign principal", deleted from first par. ", either for or on behalf of such foreign principal or otherwise in his capacity as agent of such foreign principal," preceding "knowingly", substituted in second par. "foreign national" for "agent of a foreign principal or from such foreign principal" and definition of "foreign national" for prior definitions of "foreign principal" and "agent of a foreign principal" and increased penalty for violations to $25,000 from $5,000.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–443 effective Jan. 1, 1975, see section 410(a) of Pub. L. 93–443, set out as a note under section 431 of Title 2, The Congress.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 2 sections 437c, 437d, 437f, 437g, 437h, 455; title 22 section 612.

§ 614. Prohibition of contributions in name of another.

(a) No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

(b) Any person who violates this section shall be fined not more than $25,000 or imprisoned not more than one year, or both. (Added Pub. L. 93–443, title I, § 101(f)(1), Oct. 15, 1974, 88 Stat. 1268.)

EFFECTIVE DATE

Section effective Jan. 1, 1975, see section 410(a) of Pub. L. 93–443, set out as a note under section 431 of Title 2, The Congress.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 591 of this title; title 2 sections 437c, 437d, 437f, 437g, 437h, 455.

§ 615. Limitation on contributions of currency.

(a) No person shall make contributions of currency of the United States or currency of any foreign country to or for the benefit of any candidate which, in the aggregate, exceeds $100, with respect to any campaign of such candidate for nomination for election, or for election, to Federal office.

(b) Any person who violates this section shall be fined not more than $25,000 or imprisoned not more than one year, or both. (Added Pub. L. 93–443, title I, § 101(f)(1), Oct. 15, 1974, 88 Stat. 1268.)

EFFECTIVE DATE

Section effective Jan. 1, 1975, see section 410(a) of Pub. L. 93–443, set out as a note under section 431 of Title 2, The Congress.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 591 of this title; title 2 sections 437c, 437d, 437f, 437g, 437h, 455.

§ 616. Acceptance of excessive honorariums.

Whoever, while an elected or appointed officer or employee of any branch of the Federal Government—

(1) accepts any honorarium of more than $1,000 (excluding amounts accepted for actual travel and subsistence expenses) for any appearance, speech, or article; or

(2) accepts honorariums (not prohibited by paragraph (1) of this section) aggregating more than $15,000 in any calendar year; shall be fined not less than $1,000 nor more than $5,000.

(Added Pub. L. 93–443, title I, § 101(f)(1), Oct. 15, 1974, 88 Stat. 1268.)

EFFECTIVE DATE

Section effective Jan. 1, 1975, see section 410(a) of Pub. L. 93–443, set out as a note under section 431 of Title 2, The Congress.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 2 sections 437c, 437d, 437f, 437g, 437h, 455.

§ 617. Fraudulent misrepresentation of campaign authority.

Whoever, being a candidate for Federal office or an employee or agent of such a candidate—

(1) fraudulently misrepresents himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof; or

(2) willfully and knowingly participates in or conspires to participate in any plan, scheme, or design to violate paragraph (1);

shall, for each such offense, be fined not more than $25,000 or imprisoned not more than one year, or both. (Added Pub. L. 93–443, title I, § 101(f)(1), Oct. 15, 1974, 88 Stat. 1268.)

EFFECTIVE DATE

Section effective Jan. 1, 1975, see section 410(a) of Pub. L. 93–443, set out as a note under section 431 of Title 2, The Congress.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 591 of this title; title 2 sections 437c, 437d, 437f, 437g, 437h, 455.

Chapter 31.—EMBEZZLEMENT AND THEFT

Sec.
665. Theft or embezzlement from manpower funds; improper inducement.

AMENDMENTS

1973—Pub. L. 93–203, title VII, § 711(b), formerly title VI, § 611(b), Dec. 28, 1973, 87 Stat. 882, renumbered Pub. L. 93–567, title I, § 101, Dec. 31, 1974, 88 Stat. 1845, added item 665.

§ 659. Interstate or foreign shipments by carrier; State prosecutions.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1961, 2516 of this title.

§ 664. Theft or embezzlement from employee benefit plan.

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974. (As amended Pub. L. 93–406, title I, § 111(a)(2)(A), Sept. 2, 1974, 88 Stat. 851.)

REFERENCES IN TEXT

Title I of the Employee Retirement Income Security Act of 1974, referred to in text, is classified to section 1001 et seq. of Title 29, Labor.

AMENDMENTS

1974—Pub. L. 93–406 substituted "any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974" for "any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act".

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–406 effective Jan. 1, 1975, except as provided in section 1031(b)(2) of Title 29, Labor, see section 1031(b)(1) of Title 29.

CROSS REFERENCES

Wire or oral communications, authorization for interception, to provide evidence of offenses under this section, see section 2516 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1961, 2516 of this title; title 29 section 1031.

§ 665. Theft or embezzlement from manpower funds; improper inducement.

(a) Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any agency receiving financial assistance under the Comprehensive Employment and Training Act of 1973 embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to this Act shall be fined not more than $10,000 or imprisoned for not more than two years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, he shall be fined not more than $1,000, or imprisoned not more than one year, or both.

(b) Whoever, by threat of procuring dismissal of any person from employment or of refusal to employ or refusal to renew a contract of employment in connection with a grant or contract of assistance under the Comprehensive Employment and Training Act of 1973, induces any person to give up any money or thing of any value to any person (including such grantee agency) shall be fined not more than $1,000, or imprisoned not more than one year, or both. (Added Pub. L. 93–203, title VII, § 711(a) formerly title VI, § 611(a), Dec. 28, 1973, 87 Stat. 881, renumbered Pub. L. 93–567, title I, § 101, Dec. 31, 1974, 88 Stat. 1845.)

REFERENCES IN TEXT

The "Comprehensive Employment and Training Act of 1973" and "this Act", referred to in text, is classified to section 801 et seq. of Title 29, Labor.

Chapter 33.—EMBLEMS, INSIGNIA AND NAMES

Sec.
711a. "Woodsy Owl" character, name, or slogan.
712. Misuse of names, words, emblems, or insignia.
715. "The Golden Eagle Insignia".

AMENDMENTS

1974—Pub. L. 93–318, § 8, June 22, 1974, 88 Stat. 245, added item 711a.

1973—Pub. L. 93–147, § 1(b), Nov. 3, 1973, 87 Stat. 555, substituted "Misuse of names, words, emblems, or insignia" for "Misuse of names by collecting agencies to indicate Federal agency" in item 712.

1972—Pub. L. 92–347, § 3(c), July 11, 1972, 86 Stat. 462, added item 715.

§ 700. Desecration of the flag of the United States; penalties.

CROSS REFERENCE

Penalty for mutilation or use of flag for advertising purposes, see section 3 of Title 4, Flag and Seal, Seat of Government, and the States.

§ 711. "Smokey Bear" character or name.

Whoever, except as authorized under rules and regulations issued by the Secretary of Agriculture after consultation with the Association of State Foresters and the Advertising Council, knowingly and for profit manufactures, reproduces, or uses the character "Smokey Bear", originated by the Forest Service, United States Department of Agriculture, in cooperation with the Association of State Foresters and the Advertising Council for use in public information concerning the prevention of forest fires, or any facsimile thereof, or the name "Smokey Bear" shall be fined not more than $250 or imprisoned not more than six months, or both.

* * * * *

(As amended June 22, 1974, Pub. L. 93–318, § 5, 88 Stat. 245.)

AMENDMENTS

1974—Pub. L. 93–318 inserted "and for profit" following "knowingly" and struck out "as a trade name or in such manner as suggests the character 'Smokey Bear' " following "facsimile thereof, or the name 'Smokey Bear'."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 31 section 488a.

§ 711a. "Woodsy Owl" character, name, or slogan.

Whoever, except as authorized under rules and regulations issued by the Secretary, knowingly and for profit manufactures, reproduces, or uses the character "Woodsy Owl", the name "Woodsy Owl", or the associated slogan, "Give a Hoot, Don't Pollute" shall be fined not more than $250 or imprisoned not more than six months, or both. (Added Pub. L. 93–318, § 6, June 22, 1974, 88 Stat. 245.)

DESCRIPTION OF "WOODSY OWL" CHARACTER

For description of character of "Woodsy Owl" as referred to in this section, see section 488b–3 of Title 31, Money and Finance.

§ 712. Misuse of names, words, emblems, or insignia.

Whoever, in the course of collecting or aiding in the collection of private debts or obligations, or being engaged in furnishing private police, investigation, or other private detective services, uses or employs in any communication, correspondence, notice, advertisement, or circular the words "national", "Federal", or "United States", the initials "U.S." or any emblem, insignia, or name, for the purpose of conveying and in a manner reasonably calculated to convey the false impression that such communication is from a department, agency, bureau, or instrumentality of the United States or in any manner represents the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both. (As amended Pub. L. 93–147, § 1(a), Nov. 3, 1973, 87 Stat. 554.)

AMENDMENTS

1973—Pub. L. 93–147 substituted "Misuse of names, words, emblems, or insignia" for "Misuse of names by collecting agencies or private detective agencies to indicate Federal agency" in the section catchline and substituted "in the course" and "such communication is from

a department" for "being engaged in the business" and "such business is a department" respectively, and struck out "as part of the firm name of such business," following "detective services, uses".

§ 713. Use of likenesses of the great seal of the United States, and of the seals of the President and Vice President.

EX. ORD. NO. 11649. REGULATIONS GOVERNING SEALS OF PRESIDENT AND VICE PRESIDENT OF UNITED STATES

Ex. Ord. No. 11649, Feb. 16, 1972, 37 F.R. 3625, provided: By virtue to the authority vested in me by section 713(b) of title 18, United States Code [subsec. (b) of this section], I hereby prescribe the following regulations governing the use of the Seals of the President and the Vice President of the United States:

SECTION 1. Except as otherwise provided by law, the knowing manufacture, reproduction, sale, or purchase for resale of the Seals or Coats of Arms of the President or the Vice President of the United States, or any likeness or substantial part thereof, shall be permitted only for the following uses:

(a) Use by the President or Vice President of the United States;

(b) Use in encyclopedias, dictionaries, books, journals, pamphlets, periodicals, or magazines incident to a description or history of seals, coats of arms, heraldry, or the Presidency or Vice Presidency. Such use shall be limited exclusively to the text, and any use of the Presidential or Vice Presidential Seal or Coat of Arms or any likeness or substantial part thereof on the cover of the above items is prohibited;

(c) Use in libraries, museums, or educational facilities incident to descriptions or exhibits relating to seals, coats of arms, heraldry, or the Presidency or Vice Presidency;

(d) Use as an architectural embellishment in libraries, museums, or archives established to house the papers or effects of former Presidents or Vice Presidents;

(e) Use on a monument to a former President or Vice President;

(f) Use by way of photographic or electronic visual reproduction in pictures, moving pictures, or telecasts of bona fide news content;

(g) Such other uses for exceptional historical, educational, or newsworthy purposes as may be authorized in writing by the Counsel to the President.

SEC. 2. The manufacture, reproduction, sale, or purchase for resale, either separately or appended to any article manufactured or sold, of the Seals of the President or Vice President, or any likeness or substantial part thereof, except as provided in this Order or as otherwise provided by law, is prohibited.

RICHARD NIXON.

§ 715. "The Golden Eagle Insignia".

As used in this section, "The Golden Eagle Insignia" means the words "The Golden Eagle" and the representation of an American Golden Eagle (colored gold) and a family group (colored midnight blue) enclosed within a circle (colored white with a midnight blue border) framed by a rounded triangle (colored gold with a midnight blue border) which was originated by the Department of the Interior as the official symbol for Federal recreation fee areas.

Whoever, except as authorized under rules and regulations issued by the Secretary of the Interior, knowingly manufactures, reproduces, or uses "The Golden Eagle Insignia", or any facsimile thereof, in such a manner as is likely to cause confusion, or to cause mistake, or to deceive, shall be fined not more than $250 or imprisoned not more than six months, or both.

The use of any such emblem, sign, insignia, or words which was lawful on the date of enactment of this Act shall not be a violation of this section.

A violation of this section may be enjoined at the suit of the Attorney General, upon complaint by the Secretary of the Interior. (Added Pub. L. 92–347, § 3(b), July 11, 1972, 86 Stat. 461.)

REFERENCES IN TEXT

The date of enactment of this Act, referred to in the text, means the date of enactment of Pub. L. 92–347, which was approved July 11, 1972.

Chapter 35.—ESCAPE AND RESCUE

§ 756. Internee of belligerent nation.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title; title 22 section 465.

Chapter 39.—EXPLOSIVES AND OTHER DANGEROUS ARTICLES

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 7 section 136q; title 33 section 1507; title 49 section 1811.

Chapter 40.—IMPORTATION, MANUFACTURE, DISTRIBUTION AND STORAGE OF EXPLOSIVE MATERIALS

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 42 section 3795.

§ 844. Penalties.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2516 of this title.

§ 845. Exceptions; relief from disabilities.

(a) Except in the case of subsections (d), (e), (f), (g), (h), and (i) of section 844 of this title, this chapter shall not apply to:

* * * * *

(5) commercially manufactured black powder in quantities not to exceed fifty pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers, intended to be used solely for sporting, recreational, or cultural purposes in antique firearms as defined in section 921(a)(16) of title 18 of the United States Code, or in antique devices as exempted from the term "destructive device" in section 921(a)(4) of title 18 of the United States Code; and

* * * * *

(As amended Pub. L. 93–639, § 101, Jan. 4, 1975, 88 Stat. 2217.)

AMENDMENTS

1975—Subsec. (a). Pub. L. 93–639, in par. (5), substituted provisions exempting commercially manufactured black powder in quantities not exceeding fifty pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers, intended to be used solely for sporting, recreational, or cultural purposes in antique firearms or in antique devices for such exemption of black powder in quantities not exceeding five pounds.

SHORT TITLE

Section 1 of Pub. L. 93–639 provided: "That this Act [amending this section and section 921 of this title] may be cited as 'Amendments of 1973 to Federal Law Relating to Explosives'."

Chapter 41.—EXTORTION AND THREATS

§ 874. Kickbacks from public works employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 29 section 1111.

Chapter 42.—EXTORTIONATE CREDIT TRANSACTIONS

§§ 891 to 894.

SECTIONS REFERRED TO IN OTHER SECTIONS

These sections are referred to in section 1961 of this title.

SECTIONS REFERRED TO IN D.C. CODE

These sections are referred to in sections 28:1–205, 28–3303 of the District of Columbia Code.

Chapter 44.—FIREARMS

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 42 section 3795.

§ 921. Definitions.

As used in this chapter—

* * * * *

(4) The term "destructive device" means—

* * * * *

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

* * * * *

(As amended Pub. L. 93–639, § 102, Jan. 4, 1975, 88 Stat. 2217.)

AMENDMENTS

1975—Subsec. (a)(4). Pub. L. 93–639 substituted "to use solely for sporting, recreational or cultural purposes" for "to use solely for sporting purposes".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 845 of this title.

§ 922. Unlawful acts.

(a) It shall be unlawful—

* * * * *

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any fire arm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a rifle or shotgun obtained in conformity with the provisions of subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

* * * * *

CODIFICATION

Subsec. (a)(3) of this section is set out in this Supplement to correct a typographical error.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 923 of this title; title 26 section 4182.

Chapter 45.—FOREIGN RELATIONS

Sec.

970. Protection of property occupied by foreign governments.

AMENDMENTS

1972—Pub. L. 92–539, title IV, § 402, Oct. 24, 1972, 86 Stat. 1073, added item 970.

§§ 958, 959.

SECTIONS REFERRED TO IN OTHER SECTIONS

These sections are referred to in title 22 section 461.

§ 960. Expedition against friendly nation.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 section 465.

§§ 961, 962.

SECTIONS REFERRED TO IN OTHER SECTIONS

These sections are referred to in title 22 section 461.

§§ 963 to 966.

SECTIONS REFERRED TO IN OTHER SECTIONS

These sections are referred to in title 22 section 465.

§ 967. Departure of vessel forbidden in aid of neutrality.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 sections 450, 465.

§ 970. Protection of property occupied by foreign governments.

(a) Whoever willfully injures, damages, or destroys, or attempts to injure, damage, or destroy, any property, real or personal, located within the United States and belonging to or utilized or occupied by any foreign government or international organization, by a foreign official or official guest, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) For the purpose of this section "foreign official", "foreign government", "international organization", and "official guest" shall have the same meanings as those provided in sections 1116 (b) and (c) of this title. (Added Pub. L. 92–539, title IV, § 401, Oct. 24, 1972, 86 Stat. 1073.)

Chapter 47.—FRAUD AND FALSE STATEMENTS

Sec.

1027. False statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974.

AMENDMENTS

1974—Pub. L. 93–406, title I, § 111(a)(2)(B)(iii), Sept. 2, 1974, 88 Stat. 852, substituted "Employee Retirement Income Security Act of 1974" for "Welfare and Pension Plans Disclosure Act" in item 1027.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 15 sections 78o, 80b–3.

§ 1001. Statements or entries generally.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 29 section 916; title 31 section 1052; title 42 section 3792.

§ 1027. False statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974.

Whoever, in any document required by title I of the Employee Retirement Income Security Act of 1974 (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such title to be published or any information required by such title to be certified, shall be fined not more than $10,000, or imprisoned not more than five years, or both. (As amended Pub. L. 93–406, title I, § 111(a)(2)(B)(i), (ii), Sept. 2, 1974, 88 Stat. 851.)

REFERENCES IN TEXT

Title I of the Employee Retirement Income Security Act of 1974, referred to in text, is classified to section 1001 et seq. of Title 29, Labor.

AMENDMENTS

1974—Pub. L. 93–406 substituted "Employee Retirement Income Security Act of 1974" for "Welfare and Pension Plans Disclosure Act" in the section catchline, and "title I of the Employee Retirement Income Security Act of 1974" and "title" for "the Welfare and Pension Plans Disclosure Act" and "Act", respectively, in the text.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–406 effective Jan. 1, 1975, except as provided in section 1031(b)(2) of Title 29, Labor, see section 1031(b)(1) of Title 29.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 29 sections 1031, 1111.

Chapter 51.—HOMICIDE

Sec.
1116. Murder or manslaughter of foreign officials or official guests.
1117. Conspiracy to murder.

AMENDMENTS

1972—Pub. L. 92–539, title I, § 102, Oct. 24, 1972, 86 Stat. 1071, added items 1116 and 1117.

§ 1111. Murder.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1116, 1117 of this title.

§ 1112. Manslaughter.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1116 of this title.

§ 1114. Protection of officers and employees of the United States.

Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the secret service or of the Drug Enforcement Administration, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare or of the Department of Labor assigned to perform investigative, inspection, or law enforcement functions, while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title. (As amended Oct. 26, 1974, Pub. L. 93–481, § 5, 88 Stat. 1456.)

AMENDMENTS

1974—Pub. L. 93–481 substituted "Drug Enforcement Administration" for "Bureau of Narcotics and Dangerous Drugs".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 111, 1117 of this title; title 21 sections 461, 675; title 42 section 2000e–13.

§ 1116. Murder or manslaughter of foreign officials or official guests.

(a) Whoever kills a foreign official or official guest shall be punished as provided under sections 1111 and 1112 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life.

(b) For the purpose of this section "foreign official" means—

(1) a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of cabinet rank or above of a foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, while in the United States; and

(2) any person of a foreign nationality who is duly notified to the United States as an officer or

employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee.

(c) For the purpose of this section:

(1) "Foreign government" means the government of a foreign country, irrespective of recognition by the United States.

(2) "International organization" means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288).

(3) "Family" includes (a) a spouse, parent, brother or sister, child, or person to whom the foreign official stands in loco parentis, or (b) any other person living in his household and related to the foreign official by blood or marriage.

(4) "Official guest" means a citizen or national of a foreign country present in the United States as an official guest of the government of the United States pursuant to designation as such by the Secretary of State.

(Added Pub. L. 92–539, title I, § 101, Oct. 24, 1972, 86 Stat. 1071.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 112, 970, 1117, 1201 of this title.

§ 1117. Conspiracy to murder.

If two or more persons conspire to violate section 1111, 1114, or 1116 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life. (Added Pub. L. 92–539, title I, § 101, Oct. 24, 1972, 86 Stat. 1071.)

Chapter 55.—KIDNAPING

Sec.
1201. Kidnaping.

AMENDMENTS

1972—Pub. L. 92–539, title II, § 202, Oct. 24, 1972, 86 Stat. 1072, substituted "Kidnaping" for "Transportation" in item 1201.

§ 1201. Kidnaping.

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(32)); or

(4) the person is a foreign official as defined in section 1116(b) or an official guest as defined in section 1116(c)(4) of this title,

shall be punished by imprisonment for any term of years or for life.

(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported to interstate or foreign commerce.

(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any terms of years or for life. (As amended Oct. 24, 1972, Pub. L. 92–539, title II, § 201, 86 Stat. 1072.)

AMENDMENTS

1972—Subsec. (a). Pub. L. 92–539 substituted "Kidnaping" for "Transportation" in the section catchline and, in subsec. (a), extended the jurisdictional base to include acts committed within the special maritime, territorial, and aircraft jurisdiction of the United States, and to include acts committed against foreign officials and official guests, and struck out provisions relating to death penalty.

Subsec. (b). Pub. L. 92–539 added reference to subsec. (a)(1).

Subsec. (c). Pub. L. 92–539 substituted "by imprisonment for any term of years or for life" for "as provided in subsection (a)."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1202 of this title.

Chapter 61.—LOTTERIES

Sec.
1307. State-conducted lotteries.

AMENDMENTS

1975—Pub. L. 93–583, § 2, Jan. 2, 1975, 88 Stat. 1916, added item 1307.

§§ 1301 to 1304.

SECTIONS REFERRED TO IN OTHER SECTIONS

These sections are referred to in section 1307 of this title.

§ 1307. State-conducted lotteries.

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—

(1) contained in a newspaper published in that State, or

(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by that State acting under authority of State law.

(c) For the purposes of this section "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(d) For the purposes of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests. (Added Pub. L. 93–583, § 1, Jan. 2, 1975, 88 Stat. 1916.)

Chapter 63.—MAIL FRAUD

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 29 section 1111.

§§ 1341 to 1343.

SECTIONS REFERRED TO IN OTHER SECTIONS

These sections are referred to in title 15 sections 78o, 80b–3.

Chapter 73.—OBSTRUCTION OF JUSTICE

§§ 1503, 1505, 1506, 1510.

SECTIONS REFERRED TO IN OTHER SECTIONS

These sections are referred to in title 29 section 1111.

Chapter 75.—PASSPORTS AND VISAS

§ 1546. Fraud and misuse of visas, permits, and other entry documents.

Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

* * * * *

CODIFICATION

The first paragraph of this section is set out in this Supplement to correct a typographical error, which correction was made by eliminating the comma which followed "Whoever" in the main edition.

TRANSFER OF FUNCTIONS

All functions vested by law in the Attorney General, the Department of Justice, or any other officer or any agency of that Department, with respect to the inspection at regular inspection locations at ports of entry of persons, and documents of persons, entering or leaving the United States, were transferred to the Secretary of the Treasury by 1973 Reorg. Plan No. 2, § 2, eff. July 1, 1973, 38 F.R. 15932, 87 Stat. 1091, set out in the Appendix to Title 5, Government Organization and Employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title; title 8 section 1251.

Chapter 83.—POSTAL SERVICE

§ 1716. Injurious articles as nonmailable.

(a) All kinds of poison, and all articles and compositions containing poison, and all poisonous animals, insects, reptiles, and all explosives, inflammable materials, infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, and all disease germs or scabs, and all other natural or artificial articles, compositions, or material which may kill or injure another, or injure the mails or other property, whether or not sealed as first-class matter, are nonmailable matter and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any officer or employee of the Postal Service.

(b) The Postal Service may permit the transmission in the mails, under such rules and regulations as it shall prescribe as to preparation and packing, of any such articles which are not outwardly or of their own force dangerous or injurious to life, health, or property.

(c) The Postal Service is authorized and directed to permit the transmission in the mails, under regulations to be prescribed by it, of live scorpions which are to be used for purposes of medical research or for the manufacture of antivenom. Such regulations shall include such provisions with respect to the packaging of such live scorpions for transmission in the mails as the Postal Service deems necessary or desirable for the protection of Postal Service personnel and of the public generally and for ease of handling by such personnel and by any individual connected with such research or manufacture. Nothing contained in this paragraph shall be construed to authorize the transmission in the mails of live scorpions by means of aircraft engaged in the carriage of passengers for compensation or hire.

(d) The transmission in the mails of poisonous drugs and medicines may be limited by the Postal Service to shipments of such articles from the manufacturer thereof or dealer therein to licensed physicians, surgeons, dentists, pharmacists, druggists, cosmetologists, barbers, and veterinarians under such rules and regulations as it shall prescribe.

(e) The transmission in the mails of poisons for scientific use, and which are not outwardly dangerous or of their own force dangerous or injurious to life, health, or property, may be limited by the Postal Service to shipments of such articles between the manufacturers thereof, dealers therein, bona fide research or experimental scientific laboratories, and such other persons who are employees of the Federal, a State, or local government, whose official duties are comprised, in whole or in part, of the use of such poisons, and who are designated by the head of the agency in which they are employed to receive or send such articles, under such rules and regulations as the Postal Service shall prescribe.

(f) All spirituous, vinous, malted, fermented, or other intoxicating liquors of any kinds are nonmailable and shall not be deposited in or carried through the mails.

(g) All knives having a blade which opens automatically (1) by hand pressure applied to a button or other device in the handle of the knife, or (2) by operation of inertia, gravity, or both, are nonmailable and shall not be deposited in or carried by the mails or delivered by any officer or employee of the Postal Service. Such knives may be conveyed in the mails, under such regulations as the Postal Service shall prescribe—

(1) to civilian or Armed Forces supply or procurement officers and employees of the Federal Government ordering, procuring, or purchasing such knives in connection with the activities of the Federal Government;

(2) to supply or procurement officers of the National Guard, the Air National Guard, or militia of a State, Territory, or the District of Columbia ordering, procuring, or purchasing such knives in connection with the activities of such organizations;

(3) to supply or procurement officers or employees of the municipal government of the District

of Columbia or of the government of any State or Territory, or any county, city or other political subdivision of a State or Territory, ordering, procuring, or purchasing such knives in connection with the activities of such government; and

(4) to manufacturers of such knives or bona fide dealers therein in connection with any shipment made pursuant to an order from any person designated in paragraphs (1), (2), and (3).

The Postal Service may require, as a condition of conveying any such knife in the mails, that any person proposing to mail such knife explain in writing to the satisfaction of the Postal Service that the mailing of such knife will not be in violation of this section.

(h) Any advertising, promotional, or sales matter which solicits or induces the mailing of anything declared nonmailable by this section is likewise nonmailable unless such matter contains wrapping or packaging instructions which are in accord with regulations promulgated by the Postal Service.

Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail, according to the direction thereon, or at any place at which it is directed to be delivered by the person to whom it is addressed, anything declared nonmailable by this section, unless in accordance with the rules and regulations authorized to be prescribed by the Postal Service, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail, according to the direction thereon or at any place to which it is directed to be delivered by the person to whom it is addressed, anything declared nonmailable by this section, whether or not transmitted in accordance with the rules and regulations authorized to be prescribed by the Postal Service, with intent to kill or injure another, or injure the mails or other property, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

Whoever is convicted of any crime prohibited by this section, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion, shall so order. (As amended Dec. 15, 1971, Pub. L. 92–191, § 1, 85 Stat. 647.)

AMENDMENTS

1971—Subsecs. (a)–(g). Pub. L. 92–191 designated the existing seven paragraphs preceding the penal provisions as subsecs. (a)–(g) respectively.

Subsec. (h). Pub. L. 92–191 added subsec. (h).

EFFECTIVE DATE OF 1971 AMENDMENT

Section 3 of Pub. L. 92–191 provided that: "The amendments made by this Act [adding subsec. (h) of this section and subsec. (g) of section 3001 of Title 39] shall become effective at the beginning of the third calendar month following the date of enactment of this Act [Dec. 15, 1971] or on the date section 3001 of title 39, United States Code, becomes effective pursuant to section 15(a) of Public Law 91–375 [set out as a note preceding section 101 of Title 39], whichever is the later."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 39 section 3001.

§ 1717. Letters and writings as nonmailable; opening letters.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 section 614.

Chapter 93.—PUBLIC OFFICERS AND EMPLOYEES

§ 1905. Disclosure of confidential information generally.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 15 sections 330b, 771, 773, 796, 1418, 1914, 1944, 2055, 2217; title 29 section 664; title 33 sections 1318, 1320, 1322, 1369, 1513; title 42 sections 300j–4, 1857c–9, 1857h–5, 4912, 5916; title 46 section 1463; title 49 section 1905.

Chapter 95.—RACKETEERING

§ 1951. Interference with commerce by threats or violence.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 29 section 1111.

§ 1953. Interstate transportation of wagering paraphernalia.

* * * * *

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication, or (4) equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law.

* * * * *

(As amended Pub. L. 93–583, § 3, Jan. 2, 1975, 88 Stat. 1916.)

AMENDMENTS

1975—Subsec. (b). Pub. L. 93–583 added cl. (4).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1302, 1961 of this title.

§ 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan.

Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value

because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: *Provided*, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974. (As amended Pub. L. 93–406, title I, § 111(a)(2)(C), Sept. 2, 1974, 88 Stat. 852.)

REFERENCES IN TEXT

Title I of the Employee Retirement Income Security Act of 1974, referred to in text, is classified to section 1001 et seq. of Title 29, Labor.

Section 3(4) of the Employee Retirement Income Security Act of 1974, referred to in text, is classified to section 1002(4) of Title 29, Labor.

Section (3)(16) of the Employee Retirement Income Security Act of 1974, referred to in text, probably means section 3(16) of the Employee Retirement Income Security Act of 1974, which is classified to section 1002(16) of Title 29, Labor.

AMENDMENTS

1974—Pub. L. 93–406 substituted "any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974" for "any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act, as amended" and "sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974" for "sections 3(3) and 5(b)(1) and (2) of the Welfare and Pension Plans Disclosure Act, as amended".

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–406 effective Jan. 1, 1975, except as provided in section 1031(b)(2) of Title 29, Labor, see section 1031(b)(1) of Title 29.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1961, 2516 of this title; title 29 sections 1031, 1111.

§ 1955. Prohibition of illegal gambling businesses.

* * * * *

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

* * * * *

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

* * * * *

CODIFICATION

Subsec. (b)(1)(iii) of this section is set out in this Supplement to correct a typographical error.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1961, 2516 of this title.

Chapter 101.—RECORDS AND REPORTS

§ 2074. False weather reports.

TRANSFER OF FUNCTIONS

The effective date of Reorg. Plan No. 4 of 1970, referred to in the note under this section in the 1970 ed. of the Code, is Oct. 3, 1970, and not Oct. 30, 1970, as shown therein.

Chapter 103.—ROBBERY AND BURGLARY

§ 2117. Breaking or entering carrier facilities.

EX. ORD. NO. 11836. TRANSPORTATION CARGO SECURITY PROGRAM

Ex. Ord. No. 11836, Jan. 27, 1975, 40 F.R. 4255, provided:

Theft of cargo has emerged during this decade as a serious threat to the reliability, efficiency, and integrity of the Nation's commerce. The total cost of theft-related cargo losses from our Nation's transportation system is now estimated to be in excess of one billion dollars annually. These losses seriously erode industry profits, result in higher prices for consumer goods, and provide support for unlawful activities.

In recognition of this problem, the Secretary of Transportation, at Presidential direction, has provided leadership, guidance, and technical assistance in coordinating the efforts of Federal agencies and the transportation industry in the search for solutions. Through the cooperative efforts of the Federal agencies, an effective National Cargo Security Program has been developed and is now being implemented on a voluntary basis in cooperation with the transportation industry, and with the support of State and local governments, shippers, consignees, organized labor, and insurers.

To assure more effective Federal leadership in this effort, I am directing that certain additional responsibilities be carried out by the Secretary of Transportation, delineating the functions and responsibilities of the other Federal departments and agencies with respect to the National Cargo Security Program, urging full participation and cooperation in the program by the independent regulatory agencies and all Federal departments and agencies, and requesting the Secretary of Transportation to submit to me on March 31, 1976, a full evaluation of the effectiveness of the Federal program.

NOW THEREFORE, by virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

SECTION 1. *Responsibilities of the Secretary of Transportation.* The Secretary of Transportation shall be responsible for:

(1) assisting the transportation industry by planning, developing, and testing cargo security measures and by providing technical assistance and arranging demonstration projects related thereto;

(2) coordinating the activities of Federal departments and agencies relating to the prevention of cargo theft, and studying means by which Government agencies can, through the procurement of transportation services, improve the cargo security programs of common carriers;

(3) collecting and analyzing cargo loss data for all modes of transportation, and preparing and publishing periodic reports on the extent and nature of theft-related cargo losses, local and national loss trends, and other special analyses useful to the development of theft prevention measures; and

(4) issuing, after coordination with the interested Federal departments and agencies and after opportunity for public comment, Cargo Security Advisory Standards for the prevention of cargo losses by any elements of the transportation industry, including shippers and receivers.

SEC. 2. *Responsibilities of the Attorney General.* The Attorney General shall be responsible for:

(1) developing and conducting programs designed to promote the coordination of Federal, State, and local law enforcement efforts against criminal activity relating to cargo thefts; and

(2) supporting, to the extent possible and appropriate, the provision of financial asssitance to State and local law enforcement organizations for the establishment and maintenance of cargo theft prevention programs and for the investigation, prosecution, and prevention of cargo theft.

SEC. 3. *Responsibilities of the Secretary of the Treasury.* The Secretary of the Treasury shall be responsible for:

(1) Fostering the security of international cargo in customs custody within ports of entry and in its movement and storage in bond;

(2) Investigating the theft of cargo stolen from customs custody and, consistent with the responsibilities of the Bureau of Alcohol, Tobacco and Firearms, the theft of firearms, ammunition, explosives, tobacco, and alcohol;

(3) Analyzing cargo theft reports to identify theft-conducive practices and theft-prone facilities employed in the handling of cargo controlled by the Customs Service at ports of entry, providing for the implementation of cargo security advisory standards with respect to that cargo, and initiating other corrective measures as appropriate; and

(4) Coordinating with the Department of Transportation and other interested Federal departments and agencies measures being proposed to improve the security of cargo at facilities controlled by the Customs Service.

SEC. 4. *Recommended Actions by the Transportation Regulatory Agencies.* The Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Maritime Commission are urged, in exercising their regulatory responsibilities, to recognize and consider the problem of theft-related cargo losses and encourage preventive measures, and to continue to cooperate with the Department of Transportation by:

(1) Developing cargo theft reporting systems affording full opportunity for presentation of views by the public, the Department of Transportation, other interested Federal departments and agencies, and those elements of the transportation industry from which reports would be required;

(2) Obtaining cargo loss data from carriers, freight forwarders, and terminal operators (including such information as cargo lost, missing, stolen, presumed stolen, or damaged as a result of theft); and

(3) Providing the Department of Transportation with the cargo loss data collected in a form that will permit both general and detailed analyses and preparation of reports on an intermodal and national basis.

SEC. 5. *Recommended Action by Federal Departments and Agencies.* All Federal departments and agencies, in their procurement of transportation services for goods and commodities, are urged to encourage carriers to adopt cargo theft prevention measures.

SEC. 6. *Report and Recommendations.* The Secretary of Transportation shall submit to me on March 31, 1976, and annually thereafter, a report evaluating and making recommendations concerning the effectiveness of the Federal program prescribed by this Order in reducing theft-related cargo losses.

GERALD R. FORD.

Chapter 113.—STOLEN PROPERTY

§ 2318. Transportation, sale, or receipt of phonograph records bearing forged or counterfeit labels.

Whoever knowingly and with fraudulent intent transports, causes to be transported, receives, sells, or offers for sale in interstate or foreign commerce any phonograph record, disk, wire, tape, film, or other article on which sounds are recorded, to which or upon which is stamped, pasted, or affixed any forged or counterfeited label, knowing the label to have been falsely made, forged, or counterfeited, shall be fined not more than $25,000 or imprisoned for not more than one year, or both, for the first offense and shall be fined not more than $50,000 or imprisoned not more than two years, or both, for any subsequent offense. (As amended Pub. L. 93–573, title I, § 103, Dec. 31, 1974, 88 Stat. 1873.)

AMENDMENTS

1974—Pub. L. 93–573 substituted "not more than $25,000 or imprisoned for not more than one year, or both, for the first offense and shall be fined not more than $50,000 or imprisoned not more than 2 years, or both, for any subsequent offense" for "not more than $1,000 or imprisoned not more than one year or both".

Chapter 115.—TREASON, SEDITION, AND SUBVERSIVE ACTIVITIES

§ 2386. Registration of certain organizations.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 section 612.

Chapter 119.—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 42 section 3795.

§ 2510. Definitions.

NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE

Section 804 of Pub. L. 90–351, as amended by Pub. L. 91–644, title VI, § 20, Jan. 2, 1971, 84 Stat. 1892; Pub. L. 93–609, §§ 1–3, Jan. 2, 1975, 88 Stat. 1972, 1973; Pub. L. 94–176, Dec. 23, 1975, 89 Stat. 1031, provided that:

* * * * *

"(g)(1) Notwithstanding section 2515 of title 18, United States Code, the Commission or any duly authorized subcommittee or member thereof may, for the purpose of carrying out the provisions of this title, hold such hearings, sit and act at such times and places, administer such oaths, and require by subpena or otherwise the attendance testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers and documents as the Commission or such subcommittee or member may deem advisable. Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission or before such subcommittee or member. Subpenas may be issued under the signature of the Chairman or any duly designated member of the Commission, and may be served by any person designated by the Chairman or such member.

* * * * *

"(5) Whenever the Commission or any subcommittee determines by majority vote to meet in a closed session, sections 10(a) (1) and (3) and 10(b) of the Federal Advisory Committee Act (86 Stat. 770; 5 U.S.C. Appendix) shall not apply with respect to such meeting, and section 552 of title 5, United States Code, shall not apply to the records, reports, and transcripts of any such meeting.

"(h) The Commission shall make such interim reports as it deems advisable, and it shall make a final report of its findings and recommendations to the President of the United States and to the Congress on or before April 30, 1976. Sixty days after submission of its final report, the Commission shall cease to exist.

* * * * *

REPEAL AND REVIVAL

Pub. L. 93–609, § 4, Jan. 2, 1975, 88 Stat. 1973, provided that: "For purposes of section 108 of title 1, United States Code, section 20(c) of the Omnibus Crime Control Act of 1970 [repealing section 1212 of Organized Crime Control Act of 1970] shall be deemed to provide expressly for the revival of section 804 of the Omnibus Crime Control and Safe Streets Act of 1968 [set out as a note under this section]."

§ 2514. Repealed. Pub. L. 91–452, title II, § 227(a), Oct. 15, 1970, 84 Stat. 930.

Section, Pub. L. 90–351, title II, § 802, June 19, 1968, 82 Stat. 216, provided for immunity of witnesses giving testimony or producing evidence under compulsion in Federal grand jury or court proceedings. Subject matter is now covered in sections 6002 and 6003 of this title.

EFFECTIVE DATE OF REPEAL

Sections 227(a), 260 of Pub. L. 91–452 provided for repeal of this section effective four years following sixtieth day after date of enactment of Pub. L. 91–452, which was approved Oct. 15, 1970, such repeal not affecting any immunity to which any individual was entitled under this section by reason of any testimony or other information given before such date. See section 260 of Pub. L. 91–452, set out as a note under section 6001 of this title.

PART II.—CRIMINAL PROCEDURE

Chap. Sec.
208. Speedy trial 3161

AMENDMENTS

1975—Pub. L. 93–619, title I, § 102, Jan. 3, 1975, 88 Stat. 2086, added chapter 208.

Chapter 201.—GENERAL PROVISIONS

§ 3006A. Adequate representation of defendants.

* * * * *

(*l*) Applicability in the District of Columbia.—The provisions of this Act, other than subsection (h) of section 1, shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this Act shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals. (As amended Pub. L. 93–412, § 3, Sept. 3, 1974, 88 Stat. 1093.)

AMENDMENTS

1974—Subsec. (*l*). Pub. L. 93–412 substituted "shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this Act shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals", for "shall be applicable in the District of Columbia", and struck out provisions that the plan of the District of Columbia shall be approved jointly by the Judicial Council of the District of Columbia Circuit and the District of Columbia Court of Appeals.

EFFECTIVE DATE OF 1974 AMENDMENT

Section 4 of Pub. L. 93–412 provided in part that the amendment of subsec. (*l*) of this section by Pub. L. 93–412 shall take effect on Sept. 3, 1974.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3162 of this title; title 28 section 753; title 42 section 3795.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in sections 11–2604, 11–2605 of the District of Columbia Code.

Chapter 203.—ARREST AND COMMITMENT

§ 3041. Power of courts and magistrates.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3156 of this title; title 16 section 1031.

§ 3056. Secret Service powers.

(a) Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to protect the person of the President of the United States, the members of his immediate family, the President-elect, the Vice President or other officer next in the order of succession to the office of President, and the Vice President-elect; protect the members of the immediate family of the Vice President, unless such protection is declined; protect the person of a former President and his wife during his lifetime, the person of a widow of a former President until her death or remarriage, and minor children of a former President until they reach sixteen years of age, unless such protection is declined; protect the person of a visiting head of a foreign state or foreign government and, at the direction of the President, other distinguished foreign visitors to the United States and official representatives of the United States performing special missions abroad; detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States and of foreign governments; detect and arrest any person violating any of the provisions of sections 508, 509, and 871 of this title and, insofar as the Federal Deposit Insurance Corporation, Federal land banks, joint-stock land banks and Federal land bank associations are concerned, of sections 218, 221, 433, 493, 657, 709, 1006, 1007, 1011, 1013, 1014, 1907, and 1909 of this title; execute warrants issued under the authority of the United States; carry firearms; offer and pay rewards for services or information looking toward the apprehension of criminals; pay expenses for unforeseen emergencies of a confidential nature under the direction of the Secretary of the Treasury and accounted for solely on his certificate; and perform such other functions and duties as are authorized by law. In the performance of their duties under this section, the Director, Deputy Director, Assistant Directors, Assistants to the Director, inspectors, and agents of the Secret Service are authorized to make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. Moneys expended from Secret Service appropriations for the purchase of counterfeits and subsequently recovered shall be reimbursed to the appropriation current at the time of deposit.

* * * * *

(As amended Dec. 27, 1974, Pub. L. 93–552, title VI, § 609(a), 88 Stat. 1765.)

AMENDMENTS

1974—Subsec. (a). Pub. L. 93–552 added the provisions relating to the protection of the immediate family of the Vice President unless declined, and the payment of expenses for unforeseen emergencies of a confidential nature under the direction of the Secretary of the Treasury and accounted for solely on his certificate.

EFFECTIVE DATE OF 1974 AMENDMENT

Amendment by Pub. L. 93–552 effective July 12, 1974, see section 609(b) of Pub. L. 93–552, set out as a note under section 202 of Title 3, The President.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 section 552a; title 31 section 685a.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in section 1–826 of the District of Columbia Code.

§ 3058. Interned belligerent nationals.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 section 465.

Chapter 205.—SEARCHES AND SEIZURES

§ 3109. Breaking doors or windows for entry or exit.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in section 23–524 of the District of Columbia Code.

Chapter 207.—RELEASE

Sec.
3152.[1] Establishment of Pretrial Services Agencies.
3153.[1] Organization of Pretrial Services Agencies.
3154.[1] Functions and Powers of Pretrial Services Agencies.
3155. Report to Congress.
3156. Definitions.

AMENDMENTS

1975—Pub. L. 93–619, title II, § 202, Jan. 3, 1975, 88 Stat. 2089, added items 3153–3156, and in item 3152, substituted "Establishment of Pretrial Services Agencies" for "Definitions".

§§ 3146, 3147.

SECTIONS REFERRED TO IN OTHER SECTIONS

These sections are referred to in sections 3154, 3156 of this title.

§§ 3148 to 3150.

SECTIONS REFERRED TO IN OTHER SECTIONS

These sections are referred to in section 3156 of this title.

§ 3152. Establishment of pretrial services agencies.

The Director of the Administrative Office of the United States Courts shall establish, on a demonstration basis, in each of ten representative judicial districts (other than the District of Columbia), a pretrial services agency authorized to maintain effective supervision and control over, and to provide supportive services to, defendants released under this chapter. The districts in which such agencies are to be established shall be designated by the Chief Justice of the United States after consultation with the Attorney General, on the basis of such considerations as the number of criminal cases prosecuted annually in the district, the percentage of defendants in the district presently detained prior to trial, the incidence of crime charged against persons released pending trial under this chapter, and the availability of community resources to implement the conditions of release which may be imposed under this chapter. (Added Pub. L. 93–619, title II, § 201, Jan. 3, 1975, 88 Stat. 2086.)

PRIOR PROVISIONS

A prior section 3152, as added by Pub. L. 89–465, § 3(a), June 22, 1966, 80 Stat. 216, defined the terms "judicial officer" and "offense", and was repealed by Pub. L. 93–619, title II, § 201, Jan. 3, 1975, 88 Stat. 2086. See section 3156 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3156 of this title; title 28 section 604.

[1] Analysis does not conform to section catchlines.

§ 3153. Organization of pretrial services agencies.

(a) The powers of five pretrial services agencies shall be vested in the Division of Probation of the Administrative Office of the United States Courts. Such Division shall establish general policy for such agencies.

(b) (1) The powers of each of the remaining five pretrial services agencies shall be vested in a Board of Trustees which shall consist of seven members. The Board of Trustees shall establish general policy for the agency.

(2) Members of the Board of Trustees shall be appointed by the chief judge of the United States district court for the district in which such agency is established as follows:

(A) one member, who shall be a United States district court judge;

(B) one member, who shall be the United States attorney;

(C) two members, who shall be members of the local bar active in the defense of criminal cases, and one of whom shall be a Federal public defender, if any;

(D) one member, who shall be the chief probation officer; and

(E) two members who shall be representatives of community organizations.

(c) The term of office of a member of the Board of Trustees appointed pursuant to clauses (C) (other than a public defender) and (E) of subsection (b) (2) shall be three years. A vacancy in the Board shall be filled in the same manner as the original appointment. Any member appointed pursuant to clause (C) (other than a public defender) or (E) of subsection (b) (2) to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term.

(d) (1) In each of the five demonstration districts in which pretrial service agencies are established pursuant to subsection (a) of this section, the pretrial service officer shall be a Federal probation officer of the district designated for this purpose by the Chief of the Division of Probation and shall be compensated at a rate not in excess of the rate prescribed for GS–16 by section 5332 of title 5, United States Code.

(2) In each of the five remaining demonstration districts in which pretrial service agencies are established pursuant to subsection (b) (1) of this section, after reviewing the recommendations of the judges of the district court to be served by the agency, each such Board of Trustees shall appoint a chief pretrial service officer, who shall be compensated at a rate to be established by the chief judge of the court, but not in excess of the rate prescribed for GS–15 by section 5332 of title 5, United States Code.

(3) The designated probation officer or the chief pretrial service officer, subject to the general policy established by the Division of Probation or the Board of Trustees, respectively, shall be responsible for the direction and supervision of the agency and may appoint and fix the compensation of such other personnel as may be necessary to staff such agency, and may appoint such experts and consultants as may be

necessary, pursuant to section 3109 of title 5, United States Code. The compensation of such personnel so appointed shall be comparable to levels of compensation established under chapter 53 of title 5, United States Code. (Added Pub. L. 93–619, title II, § 201, Jan. 3, 1975, 88 Stat. 2086.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3156 of this title.

§ 3154. Functions and powers of pretrial services agencies.

Each pretrial services agency shall perform such of the following functions as the district court to be served may specify:

(1) Collect, verify, and report promptly to the judicial officer information pertaining to the pretrial release of each person charged with an offense, and recommend appropriate release conditions for each such person, but such information as may be contained in the agency's files or presented in its report or which shall be divulged during the course of any hearing shall be used only for the purpose of a bail determination and shall otherwise be confidential. In their respective districts, the Division of Probation or the Board of Trustees shall issue regulations establishing policy on the release of agency files. Such regulations shall create an exception to the confidentiality requirement so that such information shall be available to members of the agency's staff and to qualified persons for purposes of research related to the administration of criminal justice. Such regulations may create an exception to the confidentiality requirement so that access to agency files will be permitted by agencies under contract pursuant to paragraph (4) of this section; to probation officers for the purpose of compiling a presentence report and in certain limited cases to law enforcement agencies for law enforcement purposes. In no case shall such information be admissible on the issue of guilt in any judicial proceeding, and in their respective districts, the Division of Probation or the Board of Trustees may permit such information to be used on the issue of guilt for a crime commited in the course of obtaining pretrial release.

(2) Review and modify the reports and recommendations specified in paragraph (1) for persons seeking release pursuant to section 3146(e) or section 3147.

(3) Supervise persons released into its custody under this chapter.

(4) With the cooperation of the Administrative Office of the United States Courts, and with the approval of the Attorney General, operate or contract for the operation of appropriate facilities for the custody or care of persons released under this chapter including, but not limited to, residential halfway houses, addict and alcoholic treatment centers, and counseling services.

(5) Inform the court of all apparent violations of pretrial release conditions or arrests of persons released to its custody or under its supervision and recommend appropriate modifications of release conditions.

(6) Serve as coordinator for other local agencies which serve or are eligible to serve as custodians under this chapter and advise the court as to the eligibility, availability, and capacity of such agencies.

(7) Assist persons released under this chapter in securing any necessary employment, medical, legal, or social services.

(8) Prepare, in cooperation with the United States marshal and the United States attorney such pretrial detention reports as are required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial.

(9) Perform such other functions as the court may, from time to time, assign.

(Added Pub. L. 93–619, title II, § 201, Jan. 3, 1975, 88 Stat. 2087.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3156 of this title.

§ 3155. Report to Congress.

(a) The Director of the Administrative Office of the United States Courts shall annually report to Congress on the accomplishments of the pretrial services agencies, with particular attention to (1) their effectiveness in reducing crime committed by persons released under this chapter; (2) their effectiveness in reducing the volume and cost of unnecessary pretrial detention; and (3) their effectiveness in improving the operation of this chapter. The Director shall include in his fourth annual report recommendations for any necessary modification of this chapter or expansion to other districts. Such report shall also compare the accomplishments of the pretrial services agencies operated by the Division of Probation with those operated by Boards of Trustees and with monetary bail or any other program generally used in State and Federal courts to guarantee presence at trial.

(b) On or before the expiration of the forty-eighth-month period following July 1, 1975, the Director of the Administrative Office of the United States Courts shall file a comprehensive report with the Congress concerning the administration and operation of the amendments made by the Speedy Trial Act of 1974, including his views and recommendations with respect thereto. (Added Pub. L. 93–619, title II, § 201, Jan. 3, 1975, 88 Stat. 2088.)

REFERENCES IN TEXT

Speedy Trial Act of 1974, referred to in subsec. (b), is Pub. L. 93–619, which is classified to sections 3152 to 3156, 3161 to 3174 of this title and section 604 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3156 of this title.

§ 3156. Definitions.

(a) As used in sections 3146–3150 of this chapter—

(1) The term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United

States, and any judge of the Superior Court of the District of Columbia; and

(2) The term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

(b) As used in sections 3152–3155 of this chapter—

(1) the term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

(Added Pub. L. 93–619, title II, § 201, Jan. 3, 1975, 88 Stat. 2088.)

Chapter 208.—SPEEDY TRIAL

Sec.
3161. Time limits and exclusions.
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AMENDMENTS

1975—Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2076, added heading of chapter 208 and items 3161 to 3174.

§ 3161. Time limits and exclusions.

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from trials with respect to other charges against the defendant;

(D) delay resulting from interlocutory appeals;

(E) delay resulting from hearings on pretrial motions;

(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery). (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2076.)

SHORT TITLE

Section 1 of Pub. L. 93–619 provided: "That this Act [enacting this chapter and sections 3153 to 3156 of this title, and amending section 3152 of this title, and section 604 of Title 28, Judiciary and Judicial Procedure] may be cited as the 'Speedy Trial Act of 1974'."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3162 to 3166, 3174 of this title.

§ 3162. Sanctions.

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161 (b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section. (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2079.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3163, 3174 of this title.

§ 3163. Effective dates.

(a) The time limitation in section 3161(b) of this chapter—

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter—

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Section 3162 of this chapter shall become effective after the date of expiration of the fourth twelve-calendar-month period following July 1, 1975. (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2080.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3161 of this title.

§ 3164. Interim limits.

(a) During an interim period commencing ninety days following July 1, 1975 and ending on the date immediately preceding the date on which the time limits provided for under section 3161(b) and section 3161(c) of this chapter become effective, each district shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving—

(1) detained persons who are being held in detention solely because they are awaiting trial, and

(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.

(b) During the period such plan is in effect, the trial of any person who falls within subsection (a)(1) or (a)(2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required. (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2081.)

§ 3165. District plans—generally.

(a) Each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare plans for the disposition of criminal cases in accordance with this chapter. Each such plan shall be formulated after consultation with, and after considering the recommendations of, the Federal Judicial Center and the planning group established for that district pursuant to section 3168. The plans shall be prepared in accordance with the schedule set forth in subsection (e) of this section.

(b) The planning and implementation process shall seek to accelerate the disposition of criminal cases in the district consistent with the time standards of this chapter and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased knowledge concerning the proper functioning of the criminal law. The process shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.

(c) The plans prepared by each district court shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of that district court may designate. If approved by the reviewing panel, the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States.

(d) The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. Modifications shall be reported to the Administrative Office of the United States Courts.

(e)(1) Prior to the expiration of the twelve-calendar-month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the second and third twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(2) Prior to the expiration of the thirty-six calendar month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the fourth and subsequent twelve-calendar month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(f) Plans adopted pursuant to this section shall, upon adoption, and recommendations of the district planning group shall, upon completion, become public documents. (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2081.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3166, 3167, 3168 of this title.

§ 3166. District plans—contents.

(a) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial or other disposition of criminal cases, consistent with the time limits and other objectives of this chapter.

(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including:

(1) the incidence of and reasons for, requests or allowances of extensions of time beyond statutory or district standards;

(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;

(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanctions, and the nature of the sanction, if any invoked for noncompliance;

(4) the new timetable set, or requested to be set, for an extension;

(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;

(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial;

(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications; and

(8) the incidence of, and reasons for each thirty-day extention[1] under section 3161(b) with respect to an indictment in that district.

(c) Each district plan required by section 3165 shall include information and statistics concerning the administration of criminal justice within the district, including, but not limited to:

(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;

(2) the number of matters presented to the United States Attorney for prosecution, and the numbers of such matters prosecuted and not prosecuted;

(3) the number of matters transferred to other districts or to States for prosecution;

(4) the number of cases disposed of by trial and by plea;

(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition; and

(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition.

(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time requirements consistent with section 3170 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.

[1] So in original. Probably should be "extension".

(Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2082.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3170 of this title.

§ 3167. Reports to Congress.

(a) The Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit periodic reports to Congress detailing the plans submitted pursuant to section 3165. The reports shall be submitted within three months following the final dates for the submission of plans under section 3165(e) of this title.

(b) Such reports shall include recommendations for legislative changes or additional appropriations to achieve the time limits and objectives of this chapter. The report shall also contain pertinent information such as the state of the criminal docket at the time of the adoption of the plan; the extent of pretrial detention and release; and a description of the time limits, procedural techniques, innovations, systems, and other methods by which the trial or other disposition of criminal cases have been expedited or may be expedited in the districts. (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2083.)

§ 3168. Planning process.

(a) Within sixty days after July 1, 1975, each United States district court shall convene a planning group consisting at minimum of the Chief Judge, a United States magistrate, if any designated by the Chief Judge, the United States Attorney, the Clerk of the district court, the Federal Public Defender, if any, a private attorney experienced in the defense of criminal cases in the district, the Chief United States Probation Officer for the district, and a person skilled in criminal justice research who shall act as reporter for the group. The group shall advise the district court with respect to the formulation of all district plans and shall submit its recommendations to the district court for each of the district plans required by section 3165. The group shall be responsible for the initial formulation of all district plans and of the reports required by this chapter and in aid thereof, it shall be entitled to the planning funds specified in section 3171.

(b) The planning group shall address itself to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.

(c) Members of the planning group with the exception of the reporter shall receive no additional compensation for their services, but shall be reimbursed for travel, subsistence and other necessary expenses incurred by them in carrying out the duties of the advisory group in accordance with the provisions of title 5, United States Code, chapter 57. The reporter shall be compensated in accordance

with section 3109 of title 5, United States Code, and notwithstanding other provisions of law he may be employed for any period of time during which his services are needed. (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2083.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3165 of this title.

§ 3169. Federal Judicial Center.

The Federal Judicial Center shall advise and consult with the planning groups and the district courts in connection with their duties under this chapter. (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2084.)

§ 3170. Speedy trial data.

(a) To facilitate the planning process and the implementation of the time limits and objectives of this chapter, the clerk of each district court shall assemble the information and compile the statistics required by sections 3166 (b) and (c) of this title. The clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.

(b) The clerk of each district court is authorized to obtain the information required by sections 3166 (b) and (c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States district court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.

(c) The information and statistics compiled by the clerk pursuant to this section shall be made available to the district court, the planning group, the circuit council, and the Administrative Office of the United States Courts. (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2084.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3166 of this title.

§ 3171. Planning appropriations.

(a) There is authorized to be appropriated for the fiscal year ending June 30, 1975, to the Federal judiciary the sum of $2,500,000 to be allocated by the Administrative Office of the United States Courts to Federal judicial districts to carry out the initial phases of planning and implementation of speedy trial plans under this chapter. The funds so appropriated shall remain available until expended.

(b) No funds appropriated under this section may be expended in any district except by two-thirds vote of the planning group. Funds to the extent available may be expended for personnel, facilities, and any other purpose permitted by law. (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2084.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3168 of this title.

§ 3172. Definitions.

As used in this chapter—

(1) the terms "judge" or "judicial officer" mean, unless otherwise indicated, any United States magistrate, Federal district judge, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

(Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2085.)

§ 3173. Sixth amendment rights.

No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution. (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2085.)

§ 3174. Judicial emergency.

(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits. The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.

(b) If the judicial council of the circuit shall find that no remedy for such congestion is reasonably available, such council may apply to the Judicial Conference of the United States for a suspension of time limits set forth in section 3161(c). The Judicial Conference, if it finds that such calendar congestion cannot be reasonably alleviated, may grant a suspension of the time limits in section 3161(c) for a period of time not to exceed one year for the trial of cases for which indictments are filed during such period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from arrangement[1] to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section.

(c) Any suspension of time limits granted by the Judicial Conference shall be reported to the Congress within ten days of approval by the Director of the Administrative Office of the United States Courts, together with a copy of the application for such suspension, a written report setting forth detailed

[1] So in original. Probably should be "arraignment".

reasons for granting such approval and a proposal for increasing the resources of such district. In the event an additional period of suspension of time limits is necessary, the Director of the Administrative Office of the United States Courts shall so indicate in his report to the Congress, which report shall contain such application for such additional period of suspension together with any other pertinent information. The Judicial Conference shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent by the Congress. Such consent may be requested by the Judicial Conference by reporting to the Congress the facts supporting the need for a suspension within such six-month period. Should the Congress fail to act on any application for a suspension of time limits within six months, the Judicial Conference may grant such a suspension for an additional period not to exceed one year. (Added Pub. L. 93–619, title I, § 101, Jan. 3, 1975, 88 Stat. 2085.)

Chapter 209.—EXTRADITION

§ 3181. Scope and limitation of chapter.

TREATIES OF EXTRADITION

The United States has entered into the following bilateral treaties of extradition:

Country	Date signed	Entered into force	Citation
Albania	Mar. 1, 1933	Nov. 14, 1935	49 Stat. 3313.
Argentina	Sept. 26, 1896	July 2, 1900	31 Stat. 1883.
	Jan. 21, 1972	Sept. 15, 1972	23 UST 3501.
Australia	Dec. 22, 1931	Aug. 30, 1935	47 Stat. 2122.
Austria	Jan. 31, 1930	Sept. 11, 1930	46 Stat. 2779.
	May 19, 1934	Sept. 5, 1934	49 Stat. 2710.
Bahamas	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Barbados	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Belgium	Oct. 26, 1901	July 14, 1902	32 Stat. 1984.
	June 20, 1935	Nov. 7, 1935	49 Stat. 3276.
	Nov. 14, 1963	Dec. 25, 1964	15 UST 2252.
Bolivia	Apr. 21, 1900	Jan. 22, 1902	32 Stat. 1857.
Brazil	Jan. 13, 1961	Dec. 17, 1964	15 UST 2093.
	June 18, 1962	Dec. 17, 1964	15 UST 2112.
Bulgaria	Mar. 19, 1924	June 24, 1924	43 Stat. 1886.
	June 8, 1934	Aug. 15, 1935	49 Stat. 3250.
Burma	Dec. 22, 1931	Nov. 1, 1941	47 Stat. 2122.
Canada	Aug. 9, 1842		8 Stat. 572.
	July 12, 1889		26 Stat. 1508.
	Dec. 13, 1900		32 Stat. 1864.
	Apr. 12, 1905		34 Stat. 2903.
	May 18, 1908	June 30, 1908	35 Stat. 2035.
	May 15, 1922	Nov. 3, 1922	42 Stat. 2224.
	Jan. 8, 1925	July 27, 1925	44 Stat. 2100.
	Oct. 26, 1951	July 11, 1952	3 UST 2826.
Chile	Apr. 17, 1900	June 26, 1902	32 Stat. 1850.
Colombia	May 7, 1888	Jan. 11, 1891	26 Stat. 1534.
	Sept. 9, 1940	July 6, 1943	57 Stat. 824.
Congo (Brazzaville)	Jan. 6, 1909	July 27, 1911	37 Stat. 1526.
	Jan. 15, 1929	May 19, 1929	46 Stat. 2276.
	Apr. 23, 1936	Sept. 24, 1936	50 Stat. 1117.
Costa Rica	Nov. 10, 1922	Apr. 27, 1923	43 Stat. 1621.
Cuba	Apr. 6, 1904	Mar. 2, 1905	33 Stat. 2265.
	Dec. 6, 1904	Mar. 2, 1905	33 Stat. 2273.
	Jan. 14, 1926	June 18, 1926	44 Stat. 2392.
Cyprus	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Czechoslovakia	July 2, 1925	Mar. 29, 1926	44 Stat. 2367.
	Apr. 29, 1935	Aug. 28, 1935	49 Stat. 3253.
Denmark	June 22, 1972	July 31, 1974	TIAS 7864.
Dominican Republic	June 19, 1909	Aug. 2, 1910	36 Stat. 2468.
Ecuador	June 28, 1872	Nov. 12, 1873	18 Stat. 199.
	Sept. 22, 1939	May 29, 1941	55 Stat. 1196.
Egypt	Aug. 11, 1874	Apr. 22, 1875	19 Stat. 572.
El Salvador	Apr. 18, 1911	July 10, 1911	37 Stat. 1516.
Estonia	Nov. 8, 1923	Nov. 15, 1924	43 Stat. 1849.
	Oct. 10, 1934	May 7, 1935	49 Stat. 3190.
Fiji	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		Aug. 17, 1973	TIAS 7707.
Finland	Aug. 1, 1924	Mar. 23, 1925	44 Stat. 2002.
	May 17, 1934	Aug. 10, 1934	49 Stat. 2690.
France	Jan. 6, 1909	July 27, 1911	37 Stat. 1526.
	Jan. 15, 1929	May 19, 1929	46 Stat. 2276.
	Apr. 23, 1936	Sept. 24, 1936	50 Stat. 1117.
	Feb. 12, 1970	Apr. 3, 1971	22 UST 407.
Gambia	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Germany, Federal Republic of.	July 12, 1930	Apr. 26, 1931	47 Stat. 1862.
Ghana	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Granada	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Greece	May 6, 1931	Nov. 1, 1932	47 Stat. 2185.
	Sept. 2, 1937	Sept. 2, 1937	51 Stat. 357.
Guatemala	Feb. 27, 1903	Aug. 15, 1903	33 Stat. 2147.
	Feb. 20, 1940	Mar. 13, 1941	55 Stat. 1097.
Guyana	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Haiti	Aug. 9, 1904	June 28, 1905	34 Stat. 2858.
Honduras	Jan. 15, 1909	July 10, 1912	37 Stat. 1616.
	Feb. 21, 1927	June 5, 1928	45 Stat. 2489.
Hungary	July 3, 1856	Dec. 13, 1856	11 Stat. 691.
Iceland	Jan. 6, 1902		32 Stat. 1906.
	Nov. 6, 1905	Feb. 19, 1906	34 Stat. 2887.
India	Dec. 22, 1931	Mar. 9, 1942	47 Stat. 2122.
Iraq	June 7, 1934	Apr. 23, 1936	49 Stat. 3380.
Ireland	July 12, 1889		26 Stat. 1508.
	Dec. 13, 1900		32 Stat. 1864.
	Apr. 12, 1905		34 Stat. 2903.
Israel	Dec. 10, 1962	Dec. 5, 1963	14 UST 1707.
		Apr. 11, 1967	18 UST 382.
Italy	Mar. 23, 1868	Sept. 17, 1868	15 Stat. 629.
	Jan. 21, 1869	May 7, 1869	16 Stat. 767.
	June 11, 1884	Apr. 24, 1885	24 Stat. 1001.
		Apr. 17, 1946	61 Stat. 3687.
	Jan. 18, 1973	Mar. 11, 1975	TIAS 8052.
Jamaica	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Japan	Apr. 29, 1886	Nov. 26, 1886	24 Stat. 1015.
	May 17, 1906	Oct. 5, 1906	34 Stat. 2951.
Kenya	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		Aug. 19, 1965	TIAS 5916.
Latvia	Oct. 16, 1923	Mar. 1, 1924	43 Stat. 1738.
	Oct. 10, 1934	Mar. 29, 1935	49 Stat. 3131.
Lesotho	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Liberia	Nov. 1, 1937	Nov. 21, 1939	54 Stat. 1733.
Liechtenstein	May 20, 1936	June 28, 1937	50 Stat. 1337.
Lithuania	Apr. 9, 1924	Aug. 23, 1924	43 Stat. 1835.
	May 17, 1934	Jan. 8, 1935	49 Stat. 3077.
Luxembourg	Oct. 29, 1883	Aug. 13, 1884	23 Stat. 808.
	Apr. 24, 1935	Mar. 3, 1936	49 Stat. 3355.
Malawi	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		Apr. 4, 1967	18 UST 1822.
Malaysia	Dec. 22, 1931		47 Stat. 2122.
Malta	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Mauritius	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Mexico	Feb. 22, 1899	Apr. 22, 1899	31 Stat. 1818.
	June 25, 1902	Apr. 13, 1903	TS 421.
	Dec. 23, 1925	July 11, 1926	44 Stat. 2409.
	Aug. 16, 1939	Apr. 14, 1941	55 Stat. 1133.
Monaco	Feb. 15, 1939	Mar. 28, 1940	54 Stat. 1780.
Nauru	Dec. 22, 1931		47 Stat. 2122.
Netherlands	June 2, 1887	July 11, 1889	26 Stat. 1481.
	Jan. 18, 1904	Aug. 28, 1904	33 Stat. 2257.
New Zealand	July 12, 1889		26 Stat. 1508.
	Dec. 13, 1900		32 Stat. 1864.
	Apr. 12, 1905		34 Stat. 2903.
	Jan. 12, 1970	Dec 8, 1970	22 UST 1.
Nicaragua	Mar. 1, 1905	July 14, 1907	35 Stat. 1869.
Nigeria	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Norway	June 7, 1893	Dec. 8, 1893	28 Stat. 1187.
	Dec. 10, 1904	Apr. 4, 1905	34 Stat. 2865.
	Feb. 1, 1938	Aug. 6, 1938	53 Stat. 1561.
Pakistan	Dec. 22, 1931	Mar. 9, 1942	47 Stat. 2122.
Panama	May 25, 1904	May 8, 1905	34 Stat. 2851.
PapuaNewGuinea	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Paraguay	Mar. 26, 1913	Jan. 17, 1914	38 Stat. 1754.
	May 24, 1973	May 7, 1974	TIAS 7838.
Peru	Nov. 28, 1899	Feb. 22, 1901	31 Stat. 1921.
Poland	Nov. 22, 1927	July 6, 1929	46 Stat. 2282.
	Apr. 5, 1935	June 5, 1936	49 Stat. 3394.
Portugal	May 7, 1908	Nov. 14, 1908	35 Stat. 2071.
Romania	July 23, 1924	Apr. 7, 1925	44 Stat. 2020.
	Nov. 10, 1936	July 27, 1937	50 Stat. 1349.
San Marino	Jan. 10, 1906	July 8, 1908	35 Stat. 1971.
	Oct. 10, 1934	June 28, 1935	49 Stat. 3198.
Sierra Leone	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Singapore	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		June 10, 1969	20 UST 2764.
South Africa	Dec. 18, 1947	Apr. 30, 1951	2 UST 884.
Spain	June 15, 1904	Apr. 6, 1908	35 Stat. 1947.
	May 29, 1970	June 16, 1971	22 UST 737.
Sri Lanka	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Surinam	June 2, 1887	July 11, 1889	26 Stat. 1481.
	Jan. 18, 1904	Aug. 28, 1904	33 Stat. 2257.
Swaziland	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		July 28, 1970	21 UST 1930.
Sweden	Oct. 24, 1961	Dec. 3, 1963	14 UST 1845.
Switzerland	May 14, 1900	Mar. 29, 1901	31 Stat. 1928.
	Jan. 10, 1935	May 16, 1935	49 Stat. 3192.
	Jan 31, 1940	Apr. 8, 1941	55 Stat. 1140.
Tanzania	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		Dec. 6, 1965	TIAS 5946.
Thailand	Dec. 30, 1922	Mar. 24, 1924	43 Stat. 1749.
Tonga	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Trinidad and Tobago.	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Turkey	Aug. 6, 1923	Aug. 18, 1934	49 Stat. 2692.
United Arab Republic.	Aug. 11, 1874	Apr. 22, 1875	19 Stat. 572.
United Kingdom	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Uruguay	Mar. 19, 1905	June 4, 1908	35 Stat. 2028.
Venezuela	Jan. 11, 21, 1922	Apr. 14, 1923	43 Stat. 1698.
Yugoslavia	Oct. 25, 1901	June 12, 1902	32 Stat. 1890.
Zambia	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.

Chapter 219.—TRIAL BY UNITED STATES MAGISTRATES

§ 3401. Minor offenses; application of probation laws.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 16 sections 460*l*–6a, 670j, 1338.

Chapter 223.—WITNESSES AND EVIDENCE

§ 3491. Foreign documents.

Any book, paper, statement, record, account, writing, or other document, or any portion thereof, of whatever character and in whatever form, as well as any copy thereof equally with the original, which is not in the United States shall, when duly certified as provided in section 3494 of this title, be admissible in evidence in any criminal action or proceeding in any court of the United States if the court shall find, from all the testimony taken with respect to such foreign document pursuant to a commission executed under section 3492 of this title, that such document (or the original thereof in case such document is a copy) satisfies the authentication requirements of the Federal Rules of Evidence, unless in the event that the genuineness of such document is denied, any party to such criminal action or proceeding making such denial shall establish to the satisfaction of the court that such document is not genuine. Nothing contained herein shall be deemed to require authentication under the provisions of section 3494 of this title of any such foreign documents which may otherwise be properly authenticated by law. (As amended Dec. 12, 1975, Pub. L. 94–149, § 3, 89 Stat. 806.)

AMENDMENTS

1975—Pub. L. 94–149 substituted "the authentication requirements of the Federal Rules of Evidence" for "the requirements of section 1732 of title 28".

§ 3492. Commission to consular officers to authenticate foreign documents.

(a) The testimony of any witness in a foreign country may be taken either on oral or written interrogatories, or on interrogatories partly oral and partly written, pursuant to a commission issued, as hereinafter provided, for the purpose of determining whether any foreign documents sought to be used in any criminal action or proceeding in any court of the United States are genuine, and whether the authentication requirements of the Federal Rules of Evidence are satisfied with respect to any such document (or the original thereof in case such document is a copy). Application for the issuance of a commission for such purpose may be made to the court in which such action or proceeding is pending by the United States or any other party thereto, after five days' notice in writing by the applicant party, or his attorney, to the opposite party, or his attorney of record, which notice shall state the names and addresses of witnesses whose testimony is to be taken and the time when it is desired to take such testimony. In granting such application the court shall issue a commission for the purpose of taking the testimony sought by the applicant addressed to any consular officer of the United States conveniently located for the purpose. In cases of testimony taken on oral or partly oral interrogatories, the court shall make provisions in the commission for the selection as hereinafter provided of foreign counsel to represent each party (except the United States) to the criminal action or proceeding in which the foreign documents in question are to be used, unless such party has, prior to the issuance of the commission, notified the court that he does not desire the selection of foreign counsel to represent him at the time of taking of such testimony. In cases of testimony taken on written interrogatories, such provision shall be made only upon the request of any such party prior to the issuance of such commission. Selection of foreign counsel shall be made by the party whom such foreign counsel is to represent within ten days prior to the taking of testimony or by the court from which the commission issued, upon the request of such party made within such time.

* * * * *

(As amended Dec. 12, 1975, Pub. L. 94–149, § 4, 89 Stat. 806.)

AMENDMENTS

1975—Subsec. (a). Pub. L. 94–149 substituted "the authentication requirements of the Federal Rules of Evidence" for "the requirements of section 1732 of title 28".

§ 3500. Demands for production of statements and reports of witnesses.

* * * * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

CODIFICATION

Subsec. (b) of this section is set out in this Supplement to correct a typographical error.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title.

Chapter 227.—SENTENCE, JUDGMENT, AND EXECUTION

§ 3569. Discharge of indigent prisoner.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in section 16–706 of the District of Columbia Code.

Chapter 231.—PROBATION

§ 3651. Suspension of sentence and probation.

* * * * *

The court may require a person who is an addict within the meaning of section 4251(a) of this title, or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), as a condition of probation, to participate in the community supervision

programs authorized by section 4255 of this title for all or part of the period of probation: *Provided*, That the Attorney General certifies a suitable program is available. If the Attorney General determines that the person's participation in the program should be terminated, because the person can derive no further significant benefits from participation or because his participation adversely affects the rehabilitation of other participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate. The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation. (As amended May 11, 1972, Pub. L. 92–293, § 1, 86 Stat. 136.)

AMENDMENTS

1972—Pub. L. 92–293 added paragraph permitting court to require an addict or a drug dependent person to participate in the community supervision programs as a condition of probation if the Attorney General certifies to the availability of such a program, and authorized Attorney General to determine effectiveness of treatment of probationer and probationer's effect on other participants and, if effect is adverse, to notify the court so it can make such other provision for the probationer as it deems appropriate.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 4208 of this title.

Chapter 237.—RULES OF CRIMINAL PROCEDURE

§ 3771. Procedure to and including verdict.

AMENDMENTS TO CRIMINAL RULES UNDER SUPREME COURT ORDER OF APRIL 22, 1974; POSTPONEMENT OF EFFECTIVE DATE UNTIL AUGUST 1, 1975

Pub. L. 93–361, July 30, 1974, 88 Stat. 397, provided: "That, notwithstanding the provisions of sections 3771 and 3772 of title 18 of the United States Code, the effective date of the proposed amendments to the Federal Rules of Criminal Procedure which are embraced by the order entered by the United States Supreme Court on April 22, 1974, and which were transmitted to the Congress by the Chief Justice on April 22, 1974, is postponed until August 1, 1975."

APPROVAL AND EFFECTIVE DATE OF AMENDMENTS PROPOSED APRIL 22, 1974

Pub. L. 94–64, § 2, July 31, 1975, 89 Stat. 370, provided that: "The amendments proposed by the United States Supreme Court to the Federal Rules of Criminal Procedure [adding rules 12.1, 12.2, and 29.1 and amending rules 4, 9(a), 11, 12, 15, 16, 17(f), 20, 32(a), (c), and (e), and 43] which are embraced in the order of that Court on April 22, 1974, are approved except as otherwise provided in this Act [making further amendments to rules 4, 9(a), 11, 12, 12.1, 12.2, 15, 16, 17(f), 20, 32(a), (c), and (e), and 43] and shall take effect on December 1, 1975. Except with respect to the amendment to Rule 11, insofar as it adds Rule 11(e)(6), which shall take effect on August 1, 1975, the amendments made by section 3 of this Act shall also take effect on December 1, 1975."

SHORT TITLE OF 1975 AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

Pub. L. 94–64, § 1, July 31, 1975, 89 Stat. 370, provided: "That this Act [which approved the amendments to the Federal Rules of Criminal Procedure proposed by the United States Supreme Court embraced in the order of that Court on April 22, 1974, and which made further amendments to the Rules as so amended by the Court] may be cited as the 'Federal Rules of Criminal Procedure Amendments Act of 1975'."

CONGRESSIONAL APPROVAL REQUIREMENT FOR PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE; SUSPENSION OF EFFECTIVENESS OF SUCH RULES.

Pub. L. 93–12, Mar. 30, 1973, 87 Stat. 9, provided: "That notwithstanding any other provisions of law, the Rules of Evidence for United States Courts and Magistrates, the Amendments to the Federal Rules of Civil Procedure, and the Amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on Monday, November 20, 1972, and Monday, December 18, 1972, shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress."

APPROVAL AND EFFECTIVE DATE OF AMENDMENTS PROPOSED NOVEMBER 20, 1972 AND DECEMBER 18, 1972.

Pub. L. 93–595, § 3, Jan. 2, 1975, 88 Stat. 1949, provided that: "The Congress expressly approves the amendments to the Federal Rules of Civil Procedure [Rules 30(c), 32(c), 43 and 44.1] and the amendments to the Federal Rules of Criminal Procedure [Rules 26, 26.1 and 28], which are embraced by the orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, and such amendments shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act [Jan. 2, 1975]."

PART III.—PRISONS AND PRISONERS

Chap. Sec.
319. National Institute of Corrections[1] 4351

Chapter 301.—GENERAL PROVISIONS

Sec.
4001. Limitation on detention; control of prisons.

AMENDMENTS

1971—Pub. L. 92–128, § 1(c), Sept. 25, 1971, 85 Stat. 347, substituted "Limitation on detention; control of prisons" for "Control by Attorney General" in item 4001.

§ 4001. Limitation on detention; control of prisons.

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

(b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws the Classification Act, as amended and the applicable regulations.

(2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation. (As amended Sept. 25, 1971, Pub. L. 92–128, § 1, 85 Stat. 347.)

AMENDMENTS

1971—Pub. L. 92–128, § 1(b), substituted "Limitation on detention; control of prisons" for "Control by Attorney General" in the section heading.

Subsec. (a). Pub. L. 92–128, § 1(a), added subsec. (a).

Subsec. (b). Pub. L. 92–128, § 1(a), designated the first and second pars. as pars. (1) and (2) of subsec. (b) of this section.

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[1] Item 319 is editorially inserted since chapter was enacted without a concurrent insertion in Part analysis.

Chapter 305.—COMMITMENT AND TRANSFER

§ 4082. Commitment to Attorney General; residential treatment centers; extension of limits of confinement; work furlough.

* * * * *

(c) The Attorney General may extend the limits of the place of confinement of a prisoner as to whom there is reasonable cause to believe he will honor his trust, by authorizing him, under prescribed conditions, to—

(1) visit a specifically designated place or places for a period not to exceed thirty days and return to the same or another institution or facility. An extension of limits may be granted to permit a visit to a dying relative, attendance at the funeral of a relative, the obtaining of medical services not otherwise available, the contacting of prospective employers, the establishment or reestablishment of family and community ties or for any other significant reason consistent with the public interest; or

* * * * *

(As amended Dec. 28, 1973, Pub. L. 93–209, 87 Stat. 907.)

AMENDMENTS

1973—Subsec. (c)(1). Pub. L. 93–209 provided for extension of limits to permit the establishment or reestablishment of family and community ties and deleted word "only" following "may be granted".

EX. ORD. NO. 11755. PRISON LABOR

Ex. Ord. No. 11755, Dec. 29, 1973, 39 F.R. 779, provided:

The development of the occupational and educational skills of prison inmates is essential to their rehabilitation and to their ability to make an effective return to free society. Meaningful employment serves to develop those skills. It is also true, however, that care must be exercised to avoid either the exploitation of convict labor or any unfair competition between convict labor and free labor in the production of goods and services.

Under section 4082 of title 18 of the United States Code [this section], the Attorney General is empowered to authorize Federal prisoners to work at paid employment in the community during their terms of imprisonment under conditions that protect against both the exploitation of convict labor and unfair competition with free labor.

Several states and other jurisdictions have similar laws or regulations under which individuals confined for violations of the laws of those places may be authorized to work at paid employment in the community.

Executive Order No. 325A, which was originally issued by President Theodore Roosevelt in 1905, prohibits the employment, in the performance of Federal contracts, of any person who is serving a sentence of imprisonment at hard labor imposed by a court of a State, territory, or municipality.

I have now determined that Executive Order No. 325A should be replaced with a new Executive order which would permit the employment of non-Federal prison inmates in the performance of Federal contracts under terms and conditions that are comparable to those now applicable to inmates of Federal prisons.

NOW, THEREFORE, pursuant to the authority vested in me as President of the United States, it is hereby ordered as follows:

SECTION 1. (a) All contracts involving the use of appropriated funds which shall hereafter be entered into by any department or agency of the executive branch for performance in any State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands shall, unless otherwise provided by law, contain a stipulation forbidding in the performance of such contracts, the employment of persons undergoing sentences of imprisonment which have been imposed by any court of a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands. This limitation, however, shall not prohibit the employment by a contractor in the performance of such contracts of persons on parole or probation to work at paid employment during the term of their sentence or persons who have been pardoned or who have served their terms. Nor shall it prohibit the employment by a contractor in the performance of such contracts of persons confined for violation of the laws of any of the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands who are authorized to work at paid employment in the community under the laws of such jurisdiction, if

(1)(A) The worker is paid or is in an approved work training program on a voluntary basis;

(B) Representatives of local union central bodies or similar labor union organizations have been consulted;

(C) Such paid employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services; and

(D) The rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the locality in which the work is being performed; and

(2) The Attorney General has certified that the work-release laws or regulations of the jurisdiction involved are in conformity with the requirements of this order.

(b) After notice and opportunity for hearing, the Attorney General shall revoke any such certification under section 1(a)(2) if he finds that the work-release program of the jurisdiction involved is not being conducted in conformity with the requirements of this order or with its intent or purposes.

SEC. 2. The Federal Procurement Regulations, the Armed Services Procurement Regulations, and to the extent necessary, any supplemental or comparable regulations issued by any agency of the executive branch shall be revised to reflect the policy prescribed by this order.

SEC. 3. Executive Order No. 325A is hereby superseded.

SEC. 4. This order shall be effective as of January 1, 1974.

RICHARD NIXON.

Chapter 307.—EMPLOYMENT

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 41 section 48.

§ 4124. Purchase of prison-made products by Federal departments.

TRANSFER OF FUNCTIONS

All functions vested by law (including reorganization plan) in the Bureau of the Budget or the Director of the Budget were transferred to the President of the United States by section 101 of 1970 Reorg. Plan No. 2, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085. Section 102 of 1970 Reorg. Plan No. 2, redesignated the Bureau of the Budget as the Office of Management and Budget. See Office of Management and Budget note set out under this section in the main volume.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 41 section 48.

Chapter 311.—PAROLE

§ 4201. Board of Parole; members.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in sections 24–206, 24–209 of the District of Columbia Code.

§ 4202. Prisoners eligible.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 21 section 848.

§ 4203. Application and release; terms and conditions.

(a) * * *

* * * * *

The Board may require a parolee, or a prisoner released pursuant to section 4164 of this title, who is an addict within the meaning of section 4251(a) of this title, or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), as a condition of parole or release to participate in the community supervision programs authorized by section 4255 of this title for all or part of the period of parole: *Provided,* That the Attorney General certifies a suitable program is available. If the Attorney General determines that the person's participation in the program should be terminated, because the person can derive no further significant benefits from participation or because his participation adversely affects the rehabilitation of other participants, he shall so notify the Board of Parole, which shall thereupon make such other provision with respect to the person as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

Each order of parole shall fix the limits of the parolee's residence which may be changed in the discretion of the Board.

* * * * *

(As amended May 11, 1972, Pub. L. 92–293, § 2, 86 Stat. 136.)

AMENDMENTS

1972—Subsec. (a). Pub. L. 92–293 added paragraph permitting Board of Parole to require addicts and drug dependent persons to participate in community supervision programs if the Attorney General certifies to the availability of such programs and authorized Attorney General to determine effectiveness of treatment of probation and probationer's effect on other participants and, if effect is adverse, to notify Board of Parole so it can make such other provision for the probationer as it deems appropriate.

Chapter 314.—NARCOTIC ADDICTS

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 42 section 257.

CHAPTER REFERRED TO IN D.C. CODE

This chapter is referred to in section 24–613 of the District of Columbia Code.

§ 4251. Definitions.

As used in this chapter—

* * * * *

(c) "Treatment" includes confinement and treatment in an institution and under supervised aftercare in the community and includes, but is not limited to, medical, educational, social, psychological, and vocational services, corrective and preventive guidance and training, and other rehabilitative services designed to protect the public and benefit the addict by eliminating his dependence on addicting drugs, or by controlling his dependence, and his susceptibility to addiction.

* * * * *

(As amended Pub. L. 92–420, § 3, Sept. 16, 1972, 86 Stat. 677.)

AMENDMENTS

1972—Subsec. (c). Pub. L. 92–420 substituted "by eliminating his dependence on addicting drugs, or by controlling his dependence," for "by correcting his antisocial tendencies and ending his dependence on addicting drugs".

EFFECTIVE DATE OF 1972 AMENDMENT

Amendment of subsec. (c) by Pub. L. 92–420 applicable to cases pending in a district court of the United States in which an appearance has not been made prior to Sept. 16, 1972, see section 5 of Pub. L. 92–420, set out as a note under section 2901 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3651, 4203 of this title.

§ 4255. Supervision in the community.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3651, 4203 of this title.

Chapter 319.—NATIONAL INSTITUTE OF CORRECTIONS

Sec.

4351. Establishment; Advisory Board; appointment of members; compensation; officers; committees; delegation of powers; Director, appointment and powers.[1]

4352. Authority of Institute; report to President and Congress; time; records of recipients; access; scope of section.[1]

4353. Authorization of appropriations.[1]

AMENDMENTS

1974—Pub. L. 93–415, title V, § 521, Sept. 7, 1974, 88 Stat. 1139, added chapter heading.

§ 4351. Establishment; Advisory Board; appointment of members; compensation; officers; committees; delegation of powers; Director, appointment and powers.[1]

(a) There is hereby established within the Bureau of Prisons a National Institute of Corrections.

(b) The overall policy and operations of the National Institute of Corrections shall be under the supervision of an Advisory Board. The Board shall consist of sixteen members. The following six individuals shall serve as members of the Commission ex officio: the Director of the Federal Bureau of Prisons or his designee, the Administrator of the Law Enforcement Assistance Administration or his designee, Chairman of the United States Parole Board or his designee, the Director of the Federal Judicial Center or his designee, the Deputy Assistant Administrator for the National Institute for Juvenile Justice and Delinquency Prevention or his designee, and the Assistant Secretary for Human Development of the Department of Health, Education, and Welfare or his designee.

(c) The remaining ten members of the Board shall be selected as follows:

(1) Five shall be appointed initially by the Attorney General of the United States for staggered terms; one member shall serve for one year, one member for two years, and three members for three years. Upon the expiration of each member's term, the Attorney General shall appoint successors who will each serve for a term of three years. Each mem-

[1] Section catchlines editorially inserted since sections were enacted without catchlines.

ber selected shall be qualified as a practitioner (Federal, State, or local) in the field of corrections, probation, or parole.

(2) Five shall be appointed initially by the Attorney General of the United States for staggered terms, one member shall serve for one year, three members for two years, and one member for three years. Upon the expiration of each member's term the Attorney General shall appoint successors who will each serve for a term of three years. Each member selected shall be from the private sector, such as business, labor, and education, having demonstrated an active interest in corrections, probation, or parole.

(d) The members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States. Members of the Commission who are full-time officers or employees of the United States shall serve without additional compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of the duties vested in the Board. Other members of the Board shall, while attending meetings of the Board or while engaged in duties related to such meetings or in other activities of the Commission pursuant to this title, be entitled to receive compensation at the rate not to exceed the daily equivalent of the rate authorized for GS–18 by section 5332 of title 5, United States Code, including traveltime, and while away from their homes or regular places of business may be allowed travel expenses, including per diem in lieu of subsistence equal to that authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(e) The Board shall elect a chairman from among its members who shall serve for a term of one year. The members of the Board shall also elect one or more members as a vice-chairman.

(f) The Board is authorized to appoint, without regard to the civil service laws, technical, or other advisory committees to advise the Institute with respect to the administration of this title as it deems appropriate. Members of these committees not otherwise employed by the United States, while engaged in advising the Institute or attending meetings of the committees, shall be entitled to receive compensation at the rate fixed by the Board but not to exceed the daily equivalent of the rate authorized for GS–18 by section 5332 of title 5, United States Code, and while away from their homes or regular places of business may be allowed travel expenses, including per diem in lieu of subsistence equal to that authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(g) The Board is authorized to delegate its powers under this title to such persons as it deems appropriate.

(h) The Institute shall be under the supervision of an officer to be known as the Director, who shall be appointed by the Attorney General after consultation with the Board. The Director shall have authority to supervise the organization, employees, enrollees, financial affairs, and all other operations of the Institute and may employ such staff, faculty, and administrative personnel, subject to the civil service and classification laws, as are necessary to the functioning of the Institute. The Director shall have the power to acquire and hold real and personal property for the Institute and may receive gifts, donations, and trusts on behalf of the Institute. The Director shall also have the power to appoint such technical or other advisory councils comprised of consultants to guide and advise the Board. The Director is authorized to delegate his powers under this title to such persons as he deems appropriate. (Added Pub. L. 93–415, title V, § 521, Sept. 7, 1974, 88 Stat. 1139.)

REFERENCES IN TEXT

The civil service laws, referred to in subsecs. (f) and (h), are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of that Title.

The classification laws, referred to in subsec. (h), are set forth in chapter 51 and subchapter III of chapter 53 of Title 5.

§ 4352. Authority of Institute; report to President and Congress; time; records of recipients; access; scope of section.[1]

(a) In addition to the other powers, express and implied, the National Institute of Corrections shall have authority—

(1) to receive from or make grants to and enter into contracts with Federal, State, and general units of local government, public and private agencies, educational institutions, organizations, and individuals to carry out the purposes of this chapter;

(2) to serve as a clearinghouse and information center for the collection, preparation, and dissemination of information on corrections, including, but not limited to, programs for prevention of crime and recidivism, training of corrections personnel, and rehabilitation and treatment of criminal and juvenile offenders;

(3) to assist and serve in a consulting capacity to Federal, State, and local courts, departments, and agencies in the development, maintenance, and coordination of programs, facilities, and services, training, treatment, and rehabilitation with respect to criminal and juvenile offenders;

(4) to encourage and assist Federal, State, and local government programs and services, and programs and services of other public and private agencies, institutions, and organizations in their efforts to develop and implement improved corrections programs;

(5) to devise and conduct, in various geographical locations, seminars, workshops, and training programs for law enforcement officers, judges, and judicial personnel, probation and parole personnel, correctional personnel, welfare workers, and other persons, including lay ex-offenders, and paraprofessional personnel, connected with the treatment and rehabilitation of criminal and juvenile offenders;

(6) to develop technical training teams to aid in the development of seminars, workshops, and training programs within the several States and with the State and local agencies which work with

[1] Section catchline editorially inserted since section was enacted without a catchline.

prisoners, parolees, probationers, and other offenders;

(7) to conduct, encourage, and coordinate research relating to corrections, including the causes, prevention, diagnosis, and treatment of criminal offenders;

(8) to formulate and disseminate correctional policy, goals, standards, and recommendations for Federal, State, and local correctional agencies, organizations, institutions, and personnel;

(9) to conduct evaluation programs which study the effectiveness of new approaches, techniques, systems, programs, and devices employed to improve the corrections system;

(10) to receive from any Federal department or agency such statistics, data, program reports, and other material as the Institute deems necessary to carry out its functions. Each such department or agency is authorized to cooperate with the Institute and shall, to the maximum extent practicable, consult with and furnish information to the Institute;

(11) to arrange with and reimburse the heads of Federal departments and agencies for the use of personnel, facilities, or equipment of such departments and agencies;

(12) to confer with and avail itself of the assistance, services, records, and facilities of State and local governments or other public or private agencies, organizations, or individuals;

(13) to enter into contracts with public or private agencies, organizations, or individuals, for the performance of any of the functions of the Institute; and

(14) to procure the services of experts and consultants in accordance with section 3109 of title 5 of the United States Code, at rates of compensation not to exceed the daily equivalent of the rate authorized for GS–18 by section 5332 of title 5 of the United States Code.

(b) The Institute shall on or before the 31st day of December of each year submit an annual report for the preceding fiscal year to the President and to the Congress. The report shall include a comprehensive and detailed report of the Institute's operations, activities, financial condition, and accomplishments under this title and may include such recommendations related to corrections as the Institute deems appropriate.

(c) Each recipient of assistance under this shall keep such records as the Institute shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(d) The Institute, and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for purposes of audit and examinations to any books, documents, papers, and records of the recipients that are pertinent to the grants received under this chapter.

(e) The provision of this section shall apply to all recipients of assistance under this title, whether by direct grant or contract from the Institute or by subgrant or subcontract from primary grantees or contractors of the Institute. (Added Pub. L. 93–415, title V, § 521, Sept. 7, 1974, 88 Stat. 1140.)

§ 4353. Authorization of appropriations.[1]

There is hereby authorized to be appropriated such funds as may be required to carry out the purposes of this chapter. (Added Pub. L. 93–415, title V, § 521, Sept. 7, 1974, 88 Stat. 1141.)

PART IV.—CORRECTION OF YOUTHFUL OFFENDERS

Chapter 402.—FEDERAL YOUTH CORRECTIONS ACT

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 4209 of this title; title 42 section 257.

CHAPTER REFERRED TO IN D.C. CODE

This chapter is referred to in sections 22–3202, 22–3215a, 24–613 of the District of Columbia Code.

Chapter 403.—JUVENILE DELINQUENCY

Sec.
5031. Definitions.
5032. Delinquency proceedings in district courts; transfer for criminal prosecution.
5033. Custody prior to appearance before magistrate.
5034. Duties of magistrate.
5035. Detention prior to disposition.
5036. Speed trial.
5037. Dispositional hearing.
5038. Use of juvenile records.
5039. Commitment.
5040. Support.
5041. Parole.
5042. Revocation of parole or probation.

AMENDMENTS

1974—Pub. L. 93–415, title V, § 513, Sept. 7, 1974, 88 Stat. 1138, substituted "Delinquency proceedings in district courts; transfer for criminal prosecution." for "Proceeding against juvenile deliquent." in item 5032; "Custody prior to appearance before magistrate." for "Jurisdiction; written consent; jury trial precluded." in item 5033; "Duties of magistrate." for "Probation; commitment to custody of Attorney General; support." in item 5034; "Detention prior to disposition." for "Arrest, detention and bail." in item 5035; "Speedy trial." for "Contracts for support; payment." in item 5036; "Dispositional hearing." for "Parole." in item 5037; and added items 5038 to 5042.

§ 5031. Definitions.

For the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and "juvenile delinquency" is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult. (As amended Sept. 7, 1974, Pub. L. 93–415, title V, § 501, 88 Stat. 1133.)

AMENDMENTS

1974—Pub. L. 93–415 added "or for the purpose of proceedings and disposition under this chapter for an

[1] Section catchline editorially inserted since section was enacted without a catchline.

alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday" following "eighteenth birthday," and substituted "committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult", for "committed by a juvenile and not punishable by death or life imprisonment."

§ 5032. Delinquency proceedings in district courts; transfer for criminal prosecution.

A juvenile alleged to have committed an act of juvenile delinquency shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to an appropriate district court of the United States that the juvenile court or other appropriate court of a State (1) does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, or (2) does not have available programs and services adequate for the needs of juveniles.

If the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State.

If an alleged juvenile delinquent is not surrendered to the authorities of a State or the District of Columbia pursuant to this section, any proceedings against him shall be in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The Attorney General shall proceed by information, and no criminal prosecution shall be instituted for the alleged act of juvenile delinquency except as provided below.

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile sixteen years and older alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony punishable by a maximum penalty of ten years imprisonment or more, life imprisonment, or death, criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice.

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavorial problems.

Reasonable notice of the transfer hearing shall be given to the juvenile, his parents, guardian, or custodian and to his counsel. The juvenile shall be assisted by counsel during the transfer hearing, and at every other critical stage of the proceedings.

Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred.

Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions. (As amended Sept. 7, 1974, Pub. L. 93–415, title V, § 502, 88 Stat. 1134.)

AMENDMENTS

1974—Pub. L. 93–415 substituted "Delinquency proceedings in district courts; transfer for criminal prosecution", for "Proceedings against juvenile delinquent" in section catchline, added provisions relating to certification to, and procedures in, district courts, transfer upon motion by Attorney General with respect to a juvenile sixteen years and older, factors considered in transfer, notice of transfer, barring of subsequent criminal or juvenile delinquency proceedings upon entering plea of guilty or upon taking of evidence, and admissibility of statements by a juvenile in subsequent criminal prosecution, and substituted provision relating to consent upon advice of counsel for treatment as an adult, for provision requiring consent for treatment as a juvenile.

§ 5033. Custody prior to appearance before magistrate.

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate. (As amended Sept. 7, 1974, Pub. L. 93–415, title V, § 503, 88 Stat. 1135.)

AMENDMENTS

1974—Pub. L. 93–415 substituted "Custody prior to appearance before magistrate", for "Jurisdiction; written consent; jury trial precluded" in section catchline, and substituted provisions relating to advice of rights by arresting officer, notification of Attorney General, parents, guardian or custodian, and appearance before magistrate, for provisions relating to jurisdiction of district courts, jury, consent by juvenile, and apprisal of rights by Judge of District Court.

§ 5034. Duties of magistrate.

The magistrate shall insure that the juvenile is represented by counsel before proceeding with critical stages of the proceedings. Counsel shall be assigned to represent a juvenile when the juvenile and his parents, guardian, or custodian are financially unable to obtain adequate representation. In cases where the juvenile and his parents, guardian, or custodian are financially able to obtain adequate representation but have not retained counsel, the magistrate may assign counsel and order the payment of reasonable attorney's fees or may direct the juvenile, his parents, guardian, or custodian to retain private counsel within a specified period of time.

The magistrate may appoint a guardian ad litem if a parent or guardian of the juvenile is not present, or if the magistrate has reason to believe that the

parents or guardian will not cooperate with the juvenile in preparing for trial, or that the interests of the parents or guardian and those of the juvenile are adverse.

If the juvenile has not been discharged before his initial appearance before the magistrate, the magistrate shall release the juvenile to his parents, guardian, custodian, or other responsible party (including, but not limited to, the director of a shelter-care facility upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate determines, after hearing, at which the juvenile is represented by counsel, that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others. (As amended Sept. 7, 1974, Pub. L. 93–415, title V, § 504, 88 Stat. 1135.)

AMENDMENTS

1974—Pub. L. 93–415 substituted "Duties of magistrate", for "Probation; commitment to custody of Attorney General; support" in section catchline, and substituted provisions relating to procedure before, and duties of, magistrate, for provisions relating to probation, commitment to custody of Attorney General, duties of Attorney General, and procedures aiding court in determining whether to place juvenile on probation or commit him to custody of Attorney General.

§ 5035. Detention prior to disposition.

A juvenile alleged to be delinquent may be detained only in a juvenile facility or such other suitable place as the Attorney General may designate. Whenever possible, detention shall be in a foster home or community based facility located in or near his home community. The Attorney General shall not cause any juvenile alleged to be delinquent to be detained or confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges. Insofar as possible, alleged delinquents shall be kept separate from adjudicated delinquents. Every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment. (As amended Sept. 7, 1974, Pub. L. 93–415, title V, § 505, 88 Stat. 1135.)

AMENDMENTS

1974—Pub. L. 93–415 substituted "Detention prior to disposition", for "Arrest, detention and bail" in section catchline, deleted provisions relating to discretionary power of arresting officer or marshall to confine juvenile in jail, provisions relating to bail and default of bail, and added provisions relating to mandatory separation of juvenile from adjudicated delinquents, and provisions relating to the physical conditions of confining facility.

§ 5036. Speedy trial.

If an alleged delinquent who is in detention pending trial is not brought to trial within thirty days from the date upon which such detention was begun, the information shall be dismissed on motion of the alleged delinquent or at the direction of the court, unless the Attorney General shows that additional delay was caused by the juvenile or his counsel, or consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case. Delays attributable solely to court calendar congestion may not be considered in the interest of justice. Except in extraordinary circumstances, an information dismissed under this section may not be reinstituted. (As amended Sept. 7, 1974, Pub. L. 93–415, title V, § 506, 88 Stat. 1136.)

AMENDMENTS

1974—Pub. L. 93–415 substituted "Speedy trial" for, "Contracts for support; payment" in section catchline, and substituted provisions relating to dismissal of information due to delay, for provisions relating to contracts with public or private agencies for custody and care of juvenile delinquents.

§ 5037. Dispositional hearing.

(a) If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than twenty court days after trial unless the court has ordered further study in accordance with subsection (c). Copies of the presentence report shall be provided to the attorneys for both the juvenile and the Government a reasonable time in advance of the hearing.

(b) The court may suspend the adjudication of delinquency or the disposition of the delinquent on such conditions as it deems proper, place him on probation, or commit him to the custody of the Attorney General. Probation, commitment, or commitment in accordance with subsection (c) shall not extend beyond the juvenile's twenty-first birthday or the maximum term which could have been imposed on an adult convicted of the same offense, whichever is sooner, unless the juvenile has attained his nineteenth birthday at the time of disposition, in which case probation, commitment, or commitment in accordance with subsection (c) shall not exceed the lesser of two years or the maximum term which could have been imposed on an adult convicted of the same offense.

(c) If the court desires more detailed information concerning an alleged or adjudicated delinquent, it may commit him, after notice and hearing at which the juvenile is represented by counsel, to the custody of the Attorney General for observation and study by an appropriate agency. Such observation and study shall be conducted on an out-patient basis, unless the court determines that inpatient observation and study are necessary to obtain the desired information. In the case of an alleged juvenile delinquent, inpatient study may be ordered only with the consent of the juvenile and his attorney. The agency shall make a complete study of the alleged or adjudicated delinquent to ascertain his personal traits, his capabilities, his background, any previous delinquency or criminal experience, any mental or physical defect, and any other relevant factors. The Attorney General shall submit to the court and the attorneys for the juvenile and the Government the results of the study within thirty days after the commitment of the juvenile, unless the court grants additional time. (As amended Sept. 7, 1974, Pub. L. 93–415, title V, § 507, 88 Stat. 1136.)

AMENDMENTS

1974—Pub. L. 93–415 substituted "Dispositional hearing", for "Parole" in section catchline and deleted provisions relating to parole.

§ 5038. Use of juvenile records.

(a) Throughout the juvenile delinquency proceeding the court shall safeguard the records from disclosure. Upon the completion of any juvenile delinquency proceeding whether or not there is an adjudication the district court shall order the entire file and record of such proceeding sealed. After such sealing, the court shall not release these records except to the extent necessary to meet the following circumstances:

(1) inquiries received from another court of law;

(2) inquiries from an agency preparing a presentence report for another court;

(3) inquiries from law enforcement agencies where the request for information is related to the investigation of a crime or a position within that agency;

(4) inquiries, in writing, from the director of a treatment agency or the director of a facility to which the juvenile has been committed by the court; and

(5) inquiries from an agency considering the person for a position immediately and directly affecting the national security.

Unless otherwise authorized by this section, information about the sealed record may not be released when the request for information is released to an application for employment, license, bonding, or any civil right or privilege. Responses to such inquiries shall not be different from responses made about persons who have never been involved in a delinquency proceeding.

(b) District courts exercising jurisdiction over any juvenile shall inform the juvenile, and his parent or guardian, in writing in clear and nontechnical language, of rights relating to the sealing of his juvenile record.

(c) During the course of any juvenile delinquency proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the government, or others entitled under this section to receive sealed records.

(d) Unless a juvenile who is taken into custody is prosecuted as an adult—

(1) neither the fingerprints nor a photograph shall be taken without the written consent of the judge; and

(2) neither the name nor picture of any juvenile shall be made public by any medium of public information in connection with a juvenile delinquency proceeding.

(Added Pub. L. 93–415, title V, § 508, Sept. 7, 1974, 88 Stat. 1137.)

§ 5039. Commitment.

No juvenile committed to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges.

Every juvenile who has been committed shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care including necessary psychiatric, psychological, or other care and treatment.

Whenever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home community. (Added Pub. L. 93–415, title V, § 509, Sept. 7, 1974, 88 Stat. 1138.)

§ 5040. Support.

The Attorney General may contract with any public or private agency or individual and such community-based facilities as halfway houses and foster homes for the observation and study and the custody and care of juveniles in his custody. For these purposes, the Attorney General may promulgate such regulations as are necessary and may use the appropriation for "support of United States prisoners" or such other appropriations as he may designate. (Added Pub. L. 93–415, title V, § 510, Sept. 7, 1974, 88 Stat. 1138.)

§ 5041. Parole.

The Board of Parole shall release from custody, on such conditions as it deems necessary, each juvenile delinquent who has been committed, as soon as the Board is satisfied that he is likely to remain at liberty without violating the law and when such release would be in the interest of justice. (Added Pub. L. 93–415, title V, § 511, Sept. 7, 1974, 88 Stat. 1138.)

§ 5042. Revocation of parole or probation.

Any juvenile parolee or probationer shall be accorded notice and a hearing with counsel before his parole or probation can be revoked. (Added Pub. L. 93–415, title V, § 512, Sept. 7, 1974, 88 Stat. 1138.)

TITLE 18.—APPENDIX

INTERSTATE AGREEMENT ON DETAINERS

Pub. L. 91–538, §§ 1–8, Dec. 9, 1970, 84 Stat. 1397–1403

CODIFICATION

The Interstate Agreement on Detainers is also set out in sections 24–701 to 24–705 of the District of Columbia Code.

FEDERAL RULES OF EVIDENCE

The text of the Federal Rules of Evidence enacted into law by Pub. L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1929, is set out in the Appendix To Title 28, Judiciary and Judicial Procedure. Rule 1101(b) of the Rules of Evidence provides that the rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act.

RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

As amended to January 18, 1976

II. PRELIMINARY PROCEEDINGS

Rule 5.1 Preliminary examination.

I. SCOPE, PURPOSE AND CONSTRUCTION

RULE 1. SCOPE

These rules govern the procedure in all criminal proceedings in the courts of the United States, as defined in Rule 54 (c); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrates and at proceedings before state and local judicial officers. (As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

The rule is amended to make clear that the rules are applicable to courts of the United States and, where the rule so provides, to proceedings before United States magistrates and state or local judicial officers.

Primarily these rules are intended to govern proceedings in criminal cases triable in the United States District Court. Special rules have been promulgated, pursuant to the authority set forth in 28 U.S.C. § 636(c), for the trial of "minor offenses" before United States magistrates. (See Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates (January 27, 1971).)

However, there is inevitably some overlap between the two sets of rules. The Rules of Criminal Procedure for the United States District Courts deal with preliminary, supplementary, and special proceedings which will often be conducted before United States magistrates. This is true, for example, with regard to rule 3—The Complaint; rule 4—Arrest Warrant or Summons Upon Complaint; rule 5—Initial Appearance Before the Magistrate; and rule 5.1—Preliminary Examination. It is also true, for example, of supplementary and special proceedings such as rule 40—Commitment to Another District, Removal; rule 41—Search and Seizure; and rule 46—Release from Custody. Other of these rules, where applicable, also apply to proceedings before United States magistrates. See Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, rule 1—Scope:

These rules govern the procedure and practice for the trial of minor offenses (including petty offenses) before United States magistrates under Title 18, U.S.C. § 3401, and for appeals in such cases to judges of the district courts. To the extent that pretrial and trial procedure and practice are not specifically covered by these rules, the Federal Rules of Criminal Procedure apply as to minor offenses other than petty offenses. All other proceedings in criminal matters, other than petty offenses, before United States magistrates are governed by the Federal Rules of Criminal Procedure.

State and local judicial officers are governed by these rules, but only when the rule specifically so provides. This is the case of rule 3—The Complaint; rule 4—Arrest Warrant or Summons Upon Complaint; and rule 5—Initial Appearance Before the Magistrate. These rules confer authority upon the "magistrate," a term which is defined in new rule 54 as follows:

"Magistrate" includes a United States magistrate as defined in 28 U.S.C. §§ 631–639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in rules 3, 4, and 5.

Rule 41 provides that a search warant may be issued by "a judge of a state court of record" and thus confers that authority upon appropriate state judicial officers.

The scope of rules 1 and 54 is discussed in C. Wright, Federal Practice and Procedure: Criminal §§ 21, 871–874 (1969, Supp. 1971), and 8 and 8A J. Moore, Federal Practice chapters 1 and 54 (2d ed. Cipes 1970, Supp. 1971).

II. PRELIMINARY PROCEEDINGS

RULE 3. THE COMPLAINT

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate. (As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

The amendment deletes the reference to "commissioner or other officer empowered to commit persons charged with offenses against the United States" and substitute therefor "magistrate."

The change is editorial in nature to conform the language of the rule to the recently enacted Federal Magistrates Act. The term "magistrate" is defined in rule 54.

RULE 4. WARRANT OR SUMMONS UPON COMPLAINT

(a) Issuance.

If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defandant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Probable Cause.

The finding of probable cause may be based upon hearsay evidence in whole or in part.

(c) Form.

(1) *Warrant.* The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.

(d) Execution or Service; and Return.

(1) *By Whom.* The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) *Territorial Limits.* The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) *Manner.* The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

(4) *Return.* The officer executing a warrant shall make return thereof to the magistrate or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the magistrate by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to the marshal or other authorized person for execution or service.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94–64, § 3(1)–(3), 89 Stat. 370.)

NOTES OF ADVISORY COMMITTEES ON RULES

1972 AMENDMENT

Throughout the rule the term "magistrate" is substituted for the term "commisioner." Magistrate is defined in rule 54 to include a judge of the United States, a United States magistrate, and those state and local judicial officers specified in 18 U.S.C. § 3041.

1974 AMENDMENT

The amendments are designed to achieve several objectives: (1) to make explicit the fact that the determination of probable cause may be based upon hearsay evidence; (2) to make clear that probable cause is a prerequisite to the issuance of a summons; and (3) to give priority to the issuance of a summons rather than a warrant.

Subdivision (a) makes clear that the normal situation is to issue a summons.

Subdivision (b) provides for the issuance of an arrest warrant in lieu of or in addition to the issuance of a summons.

Subdivision (b)(1) restates the provision of the old rule mandating the issuance of a warrant when a defendant fails to appear in response to a summons.

Subdivision (b)(2) provides for the issuance of an arrest warrant rather than a summons whenever "a valid reason is shown" for the issuance of a warrant. The reason may be apparent from the face of the complaint or may be provided by the federal law enforcement officer or attorney for the government. See comparable provision in rule 9.

Subdivision (b)(3) deals with the situation in which conditions change after a summons has issued. It affords the government an opportunity to demonstrate the need for an arrest warrant. This may be done in the district in which the defendant is located if this is the convenient place to do so.

Subdivision (c) provides that a warrant or summons may issue on the basis of hearsay evidence. What constitutes probable cause is left to be dealt with on a case-to-case basis, taking account of the unlimited variations in source of information and in the opportunity of the informant to perceive accurately the factual data which he furnishes. See, *e.g.*, Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); Jaben v. United States, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345 (1965); McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971); Note, The Informer's Tip as Probable Cause for Search or Arrest, 54 Cornell L.Rev. 958 (1969); C. Wright, Federal Practice and Procedure: Criminal § 52 (1969, Supp. 1971); 8 S.J. Moore, Federal Practice ¶ 4.03 (2d ed. Cipes 1970, Supp. 1971).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247

A. Amendments Proposed by the Supreme Court. Rule 4 of the Federal Rules of Criminal Procedure deals with arrest procedures when a criminal complaint has been filed. It provides in pertinent part:

If it appears . . . that there is probable cause . . . a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the *request*

of the attorney for the government a summons instead of a warrant *shall* issue. [emphasis added]

The Supreme Court's amendments make a basic change in Rule 4. As proposed to be amended, Rule 4 gives priority to the issuance of a summons instead of an arrest warrant. In order for the magistrate to issue an arrest warrant, the attorney for the government must show a "valid reason."

B. Committee Action. The Committee agrees with and approves the basic change in Rule 4. The decision to take a citizen into custody is a very important one with far-reaching consequences. That decision ought to be made by a neutral official (a magistrate) rather than by an interested party (the prosecutor).

It has been argued that undesirable consequences will result if this change is adopted—including an increase in the number of fugitives and the introduction of substantial delays in our system of criminal justice. [See testimony of Assistant Attorney General W. Vincent Rakestraw in Hearings on Proposed Amendments to Federal Rules of Criminal Procedure Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 2d Sess., Serial No. 61, at 41–43 (1974) [hereinafter cited as "Hearing I"].] The Committee has carefully considered these arguments and finds them to be wanting. [The Advisory Committee on Criminal Rules has thoroughly analyzed the arguments raised by Mr. Rakestraw and convincingly demonstrated that the undesirable consequences predicted will not necessarily result. See Hearings on Proposed Amendments to Federal Rules on Proposed Amendments to Federal Rules of Criminal Procedure Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Congress, 1st Session, Serial No. 6, at 208–09 (1975) [hereinafter cited "Hearings II"].] The present rule permits the use of a summons in lieu of a warrant. The major difference between the present rule and the proposed rule is that the present rule vests the decision to issue a summons or a warrant in the proescutor, while the proposed rule vests that decision in a judicial officer. Thus, the basic premise underlying the arguments against the proposed rule is the notion that only the prosecutor can be trusted to act responsibly in deciding whether a summons or a warrant shall issue.

The Committee rejects the notion that the federal judiciary cannot be trusted to exercise discretion wisely and in the public interest.

The Committee recast the language of Rule 4(b). No change in substance is intended. The phrase "valid reason" was changed to "good cause," a phrase with which lawyers are more familiar. [Rule 4, both as proposed by the Supreme Court and as changed by the Committee, does not in any way authorize a magistrate to issue a summons or a warrant sua sponte, nor does it enlarge, limit or change in any way the law governing warrantless arrests.]

The Committee deleted two sentences from Rule 4(c). These sentences permitted a magistrate to question the complainant and other witnesses under oath and required the magistrate to keep a record or summary of such a proceeding. The Committee does not intend this change to discontinue or discourage the practice of having the complainant appear personally or the practice of making a record or summary of such an appearance. Rather, the Committee intended to leave Rule 4(c) neutral on this matter, neither encouraging nor discouraging these practices.

The Committee added a new section that provides that the determination of good cause for the issuance of a warrant in lieu of a summons shall not be grounds for a motion to suppress evidence. This provision does not apply when the issue is whether there was probable cause to believe an offense has been committed. This provision does not in any way expand or limit the so-called "exclusionary rule."

CONFERENCE COMMITTEE NOTES, HOUSE REPORT NO. 94–414

Rule 4(e)(3) deals with the manner in which warrants and summonses may be served. The House version provides two methods for serving a summons: (1) personal service upon the defendant, or (2) service by leaving it with someone of suitable age at the defendant's dwelling *and* by mailing it to the defendant's last known address. The Senate version provides three methods: (1) personal service, (2) service by leaving it with someone of suitable age at the defendant's dwelling, or (3) service by mailing it to defendant's last known address.

APPROVAL AND EFFECTIVE DATE OF AMENDMENTS PROPOSED APR. 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Section 2 of Pub. L. 94–64 provided that: "The amendments proposed by the United States Supreme Court to the Federal Rules of Criminal Procedure [adding rules 12.1, 12.2 and 29.1 and amending rules 4, 9, 11, 12, 15, 16, 17, 20, 32 and 43 of these rules] which are embraced in the order of that Court on April 22, 1974, are approved except as otherwise provided in this Act and shall take effect on December 1, 1975. Except with respect to the amendment to Rule 11, insofar as it adds Rule 11(e)(6), which shall take effect on August 1, 1975, the amendments made by section 3 of this Act [to rules 4, 9, 11, 12, 12.1, 12.2, 15, 16, 17, 20, 32 and 43 of these rules] shall also take effect on December 1, 1975."

SHORT TITLE OF 1975 AMENDMENTS

Section 1 of Pub. L. 94–64 provided: "That this Act [amending rules 4, 9, 11, 12, 12.1, 12.2, 15, 16, 17, 20, 32 and 43 of these rules and enacting provisions set out as a note under this rule] may be cited as the 'Federal Rules of Criminal Procedure Amendments Act of 1975'."

RULE 5. INITIAL APPEARANCE BEFORE THE MAGISTRATE

(a) In general.

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Minor offenses.

If the charge against the defendant is a minor offense triable by a United States magistrate under 18 U.S.C. § 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates.

(c) Offenses not triable by the United States magistrate.

If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the

defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice. (As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

There are a number of changes made in rule 5 which are designed to improve the editorial clarity of the rule; to conform the rule to the Federal Magistrates Act; and to deal explicitly in the rule with issues as to which the rule was silent and the law uncertain.

The principal editorial change is to deal separately with the initial appearance before the magistrate and the preliminary examination. They are dealt with together in old rule 5. They are separated in order to prevent confusion as to whether they constitute a single or two separate proceedings. Although the preliminary examination can be held at the time of the initial appearance, in practice this ordinarily does not occur. Usually counsel need time to prepare for the preliminary examination and as a consequence a separate date is typically set for the preliminary examination.

Because federal magistrates are reasonably available to conduct initial appearances, the rule is drafted on the assumption that the initial appearance is before a federal magistrate. If experience under the act indicates that there must be frequent appearances before state or local judicial officers it may be desirable to draft an additional rule, such as the following, detailing the procedure for an initial appearance before a state or local judicial officer:

Initial Appearance Before a State or Local Judicial Officer. If a United States magistrate is not reasonably available under rule 5(a), the arrested person shall be brought before a state or local judicial officer authorized by 18 U.S.C. § 3041, and such officer shall inform the person of the rights specified in rule 5(c) and shall authorize the release of the arrested person under the terms provided for by these rules and by 18 U.S.C. § 3146. The judicial officer shall immediately transmit any written order of release and any papers filed before him to the appropriate United States magistrate of the district and order the arrested person to appear before such United States magistrate within three days if not in custody or at the next regular hour of business of the United States magistrate if the arrested person is retained in custody. Upon his appearance before the United States magistrate, the procedure shall be that prescribed in rule 5.

Several changes are made to conform the language of the rule to the Federal Magistrates Act.

(1) The term "magistrate," which is defined in new rule 54, is substituted for the term "commissioner." As defined, "magistrate" includes those state and local judicial officers specified in 18 U.S.C. § 3041, and thus the initial appearance may be before a state or local judicial officer when a federal magistrate is not reasonably available. This is made explicit in subdivision (a).

(2) Subdivision (b) conforms the rule to the procedure prescribed in the Federal Magistrate Act when a defendant appears before a magistrate charged with a "minor offense" as defined in 18 U.S.C. § 3401(f):

"misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both, except that such term does not include . . . [specified exceptions]."

If the "minor offense" is tried before a United States magistrate, the procedure must be in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, (January 27, 1971).

(3) Subdivision (d) makes clear that a defendant is not entitled to a preliminary examination if he has been indicted by a grand jury prior to the date set for the preliminary examination or, in appropriate cases, if any information is filed in the district court prior to that date. See C. Wright, Federal Practice and Procedure: Criminal § 80, pp. 137–140 (1969, Supp. 1971). This is also provided in the Federal Magistrates Act, 18 U.S.C. § 3060(e).

Rule 5 is also amended to deal with several issues not dealt with in old rule 5:

Subdivision (a) is amended to make clear that a complaint, complying with the requirements of rule 4(a), must be filed whenever a person has been arrested without a warrant. This means that the complaint, or an affidavit or affidavits filed with the complaint, must show probable cause. As provided in rule 4(a) the showing of probable cause "may be based upon hearsay evidence in whole or in part."

Subdivision (c) provides that defendant should be notified of the general circumstances under which he is entitled to pretrial release under the Bail Reform Act of 1966 (18 U.S.C. §§ 3141–3152). Defendants often do not in fact have counsel at the initial appearance and thus, unless told by the magistrate, may be unaware of their right to pretrial release. See C. Wright, Federal Practice and Procedure: Criminal § 78 N. 61 (1969).

Subdivision (c) makes clear that a defendant who does not waive his right to trial before a judge of the district court is entitled to a preliminary examination to determine probable cause for any offense except a petty offense. It also, by necessary implication, makes clear that a defendant is not entitled to a preliminary examination if he consents to be tried on the issue of guilt or innocence by the United States magistrate, even though the offense may be one not heretofore triable by the United States commissioner and therefore one as to which the defendant had a right to a preliminary examination. The rationale is that the preliminary examination serves only to justify holding the defendant in custody or on bail during the period of time it takes to bind the defendant over to the district court for trial. See *State* v. *Solomon*, 158 Wis. 146, 147 N.W. 640 (1914). A similar conclusion is reached in the New York Proposed Criminal Procedure Law. See McKinney's Session Law News, April 10, 1969, at p. A–119.

Subdivision (c) also contains time limits within which the preliminary examination must be held. These are taken from 18 U.S.C. § 3060. The provisions for the extension of the prescribed time limits are the same as the provisions of 18 U.S.C. § 3060 with two exceptions: The new language allows delay consented to by the defendant only if there is "a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases." This reflects the view of the Advisory Committee that delay, whether prosecution or defense induced, ought to be avoided whenever possible. The second difference between the new rule and 18 U.S.C. § 3060 is that the rule allows the decision to grant a continuance to be made by a United States magistrate as well as by a judge of the United States. This reflects the view of the

Advisory Committee that the United States magistrate should have sufficient judicial competence to make decisions such as that contemplated in subdivision (c).

Rule 5.1. Preliminary Examination

(a) Probable cause finding.

If from the evidence it appears that there is probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) Discharge of defendant.

If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

(c) Records.

After concluding the proceeding the federal magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate shall promptly make or cause to be made a record or summary of such proceeding.

(1) On timely application to a federal magistrate, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available for his information in connection with any further hearing or in connection with his preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.

(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendent unless the defendant makes a sufficient affidavit that he is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor. (Added Apr. 24, 1972, eff. Oct. 1, 1972.)

Notes of Advisory Committee on Rules

Rule 5.1 is, for the most part, a clarification of old rule 5(c).

Under the new rule, the preliminary examination must be conducted before a "federal magistrate" as defined in rule 54. Giving state or local judicial officers authority to conduct a preliminary examination does not seem necessary. There are not likely to be situations in which a "federal magistrate" is not "reasonably available" to conduct the preliminary examination, which is usually not held until several days after the initial appearance provided for in rule 5.

Subdivision (a) makes clear that a finding of probable cause may be based on "hearsay evidence in whole or in part." The propriety of relying upon hearsay at the preliminary examination has been a matter of some uncertainty in the federal system. See C. Wright, Federal Practice and Procedure: Criminal § 80 (1969, Supp. 1971); 8 J. Moore, Federal Practice ¶ 504[4] (2d ed. Cipes 1970, Supp. 1971); *Washington* v. *Clemmer*, 339 F. 2d 715, 719 (D.C. Cir. 1964); *Washington* v. *Clemmer*, 339 F. 2d 725, 728 (D.C. Cir. 1964); *Ross* v. *Sirica*, 380 F. 2d 557, 565 (D.C. Cir. 1967); *Howard* v. *United States*, 389 F. 2d 287, 292 (D.C. Cir. 1967); Weinberg and Weinberg, The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968, 67 Mich. L. Rev. 1361, especially n. 92 at 1383 (1969); D. Wright, The Rules of Evidence Applicable to Hearings in Probable Cause, 37 Conn. B.J. 561 (1963); Comment, Preliminary Examination—Evidence and Due Process, 15 Kan. L. Rev. 374, 379–381 (1967).

A grand jury indictment may properly be based upon hearsay evidence. *Costello* v. *United States*, 350 U.S. 359 (1956); 8 J. Moore, Federal Practice ¶ 6.03 [2] (2d ed. Cipes 1970, Supp. 1971). This being so, there is practical advantage in making the evidentiary requirements for the preliminary examination as flexible as they are for the grand jury. Otherwise there will be increased pressure upon United States Attorneys to abandon the preliminary examination in favor of the grand jury indictment. See C. Wright, Federal Practice and Procedure: Criminal § 80 at p. 143 (1969). New York State, which also utilizes both the preliminary examination and the grand jury, has under consideration a new Code of Criminal Procedure which would allow the use of hearsay at the preliminary examination. See McKinney's Session Law News, April 10, 1969, pp. A119–A120.

For the same reason, subdivision (a) also provides that the preliminary examination is not the proper place to raise the issue of illegally obtained evidence. This is current law. In *Giordenello* v. *United States*, 357 U.S. 480, 484 (1958), the Supreme Court said:

> [T]he Commissioner here had no authority to adjudicate the admissibility at petitioner's later trial of the heroin taken from his person. That issue was for the trial court. This is specifically recognized by Rule 41(e) of the Criminal Rules, which provides that a defendant aggrieved by an unlawful search and seizure may "* * * move the district court * * * to suppress for use as evidence anything so obtained on the ground that * * *" the arrest warrant was defective on any of several grounds.

Dicta in *Costello* v. *United States*, 350 U.S. 359. 363–364 (1956), and *United States* v. *Blue*, 384 U.S. 251, 255 (1966), also support the proposed rule. In *United States ex rel. Almeida* v. *Rundle*, 383 F. 2d 421, 424 (3d Cir. 1967), the court, in considering the adequacy of an indictment said:

> On this score, it is settled law that (1) "[an] indictment returned by a legally constituted nonbiased grand jury, * * * is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.", *Lawn* v. *United States*, 355 U.S. 399, 349, 78 S.Ct. 311, 317, 2 L.Ed. 2d 321 (1958); (2) an indictment cannot be challenged "on the ground that there was inadequate or incompetent evidence before the grand jury", *Costello* v. *United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956); and (3) a prosecution is not abated, nor barred, even where "tainted evidence" has been submitted to a grand jury, *United States* v. *Blue*, 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed. 2d 510 (1966).

See also C. Wright, Federal Practice and Procedure: Criminal § 80 at 143 n. 5 (1969, Supp. 1971) 8 J. Moore, Federal Practice ¶ 6.03 [3] (2d ed. Cipes 1970, Supp. 1971). The Manual for United States Commissioners (Administrative Office of United States Courts, 1948) provides at pp. 24–25: "Motions for this purpose [to suppress illegally obtained evidence] may be made and heard only before a district judge. Commissioners are not empowered to consider or act upon such motions."

It has been urged that the rules of evidence at the preliminary examination should be those applicable at the trial because the purpose of the preliminary examination should be, not to review the propriety of the arrest or prior detention, but rather to determine whether there is evidence sufficient to justify subjecting the defendant to the expense and inconvenience of trial. See Weinberg and Weinberg, The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968, 67 Mich. L. Rev. 1361, 1396–1399 (1969). The rule rejects this view for reasons largely of administrative necessity and the efficient administration of justice. The Congress has decided that a preliminary examination shall not be required when there is a grand jury indictment (18 U.S.C. § 3060). Increasing the procedural and evidentiary requirements applicable to the preliminary examination will therefore add to the administrative pressure to avoid the preliminary examination. Allowing objections to evidence on the ground that evidence has been illegally obtained would require two determinations of admissibility, one before the United States magistrate and one in the district court. The objective is to reduce, not increase, the number of preliminary motions.

To provide that a probable cause finding may be based upon hearsay does not preclude the magistrate from requiring a showing that admissible evidence will be available at the time of trial. See Comment, Criminal Procedure—Grand Jury—Validity of Indictment Based Solely on Hearsay Questioned When Direct Testimony Is Readily Available, 43 N.Y.U. L. Rev. 578 (1968); *United States* v. *Umans*, 368 F. 2d. 725 (2d Cir. 1966), cert. dismissed as improvidently granted 389 U.S. 80 (1967); *United States* v. *Andrews*, 381 F. 2d 377, 378 (2d Cir. 1967); *United States* v. *Messina*, 388 F. 2d 393, 394 n. 1 (2d Cir. 1968); *United States* v. *Beltram*, 388 F. 2d 449 (2d Cir. 1968); and *United States* v. *Arcuri*, 282 F. Supp. 347 (E.D.N.Y. 1968). The fact that a defendant is not entitled to object to evidence alleged to have been illegally obtained does not deprive him of an opportunity for a pretrial determination of the admissibility of evidence. He can raise such an objection prior to trial in accordance with the provisions of rule 12.

Subdivision (b) makes it clear that the United States magistrate may not only discharge the defendant but may also dismiss the complaint. Current federal law authorizes the magistrate to discharge the defendant but he must await authorization from the United States Attorney before he can close his records on the case by dismissing the complaint. Making dismissal of the complaint a separate procedure accomplishes no worthwhile objective, and the new rule makes it clear that the magistrate can both discharge the defendant and file the record with the clerk.

Subdivision (b) also deals with the legal effect of a discharge of a defendant at a preliminary examination. This issue is not dealt with explicitly in the old rule. Existing federal case law is limited. What cases there are seem to support the right of the government to issue a new complaint and start over. See *e.g.*, *Collins* v. *Loisel*, 262 U.S. 426 (1923); *Morse* v. *United States*, 267 U.S. 80 (1925). State law is similar. See *People* v. *Dillon*, 197 N.Y. 254, 90 N.E. 820 (1910; *Tell* v. *Wolke*, 21 Wis. 2d 613, 124 N.W. 2d 655 (1963). In the *Tell* case the Wisconsin court stated the common rationale for allowing the prosecutor to issue a new complaint and start over:

> The state has no appeal from errors of law committed by a magistrate upon preliminary examination and the discharge on a preliminary would operate as an unchallengeable acquittal. * * * The only way an error of law committed on the preliminary examination prejudicial to the state may be challenged or corrected is by a preliminary examination on a second complaint. (21 Wis. 2d at 619–620.)

Subdivision (c) is based upon old rule 5(c) and upon the Federal Magistrates Act, 18 U.S.C. § 3060(f). It provides methods for making available to counsel the record of the preliminary examination. See C. Wright, Federal Practice and Procedure: Criminal § 82 (1969, Supp. 1971). The new rule is designed to eliminate delay and expense occasioned by preparation of transcripts where listening to the tape recording would be sufficient. Ordinarily the recording should be made available pursuant to subdivision (c)(1). A written transcript may be provided under subdivision (c)(2) at the discretion of the court, a discretion which must be exercised in accordance with *Britt* v. *North Carolina*, 404 U.S. 226, 30 L.Ed. 2d 400, 405 (1971):

> A defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight. In this case, however, petitioner has conceded that he had available an informal alternative which appears to be substantially equivalent to a transcript. Accordingly, we cannot conclude that the court below was in error in rejecting his claim.

III. INDICTMENT AND INFORMATION

Rule 6. The Grand Jury

* * * * *

(b) Objections to grand jury and to grand jurors.

(1) *Challenges.* The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) *Motion to dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

* * * * *

(As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

Notes of Advisory Committee on Rules

1972 Amendment

Subdivision (b)(2) is amended to incorporate by express reference the provisions of the Jury Selection and Service Act of 1968. That act provides in part:

> The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime [or] the Attorney General of the United States * * * may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. [28 U.S.C. § 1867 (c)]

Under rule 12(e) the judge shall decide the motion before trial or order it deferred until after verdict. The authority which the judge has to delay his ruling until after verdict gives him an option which can be exercised to prevent the unnecessary delay of a trial in the event that a motion attacking a grand jury is made on the eve of the trial. In addition, rule 12(c) gives the judge authority to fix the time at which pretrial motions must be made. Failure to make a pretrial motion at the appropriate time may constitute a waiver under rule 12(f).

Rule 7. The Indictment and the Information

* * * * *

(c) Nature and contents.

(1) *In general.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal

commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

(2) *Criminal forfeiture.* When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

(3) *Harmless error.* Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

* * * * *

(As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

Subdivision (c)(2) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408 (a)(2).

The Congress viewed the provisions of the Organized Crime Control Act of 1970 as reestablishing a limited common law criminal forfeiture. S. Rep. No. 91-617, 91st Cong., 1st Sess. 79-80 (1969). The legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 indicates a congressional purpose to have similar procedures apply to the forfeiture of profits or interests under that act. H. Rep. No. 91-1444 (part I), 91st Cong., 2d Sess. 81-85 (1970).

Under the common law, in a criminal forfeiture proceeding the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction. Subdivision (c)(2) provides for notice. Changes in rules 31 and 32 provide for a special jury finding and for a judgment authorizing the Attorney General to seize the interest or property forfeited.

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) Issuance.

Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) *Warrant.* The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the court or, if the information or indictment charges a minor offense, before a United States magistrate. The amount of bail may be fixed by the court and endorsed on the warrant.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court or, if the information or indictment charges a minor offense, before a United States magistrate at a stated time and place.

(c) Execution or service; and return.

(1) *Execution or service.* The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person promptly before the court or before a United States magistrate.

(2) *Return.* The officer executing a warrant shall make return thereof to the court or United States magistrate. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.

(d) Remand to United States magistrate for trial of minor offense.

If the information or indictment charges a minor offense and the return is to a judge of the district court, the case may be remanded to a United States magistrate for further proceedings in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates. (As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94-64, § 3(4), 89 Stat. 370; Dec. 12, 1975, Pub. L. 94-149, § 5, 89 Stat. 806.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

Subdivision (b) is amended to make clear that the person arrested shall be brought before a United States magistrate if the information or indictment charges a "minor offense" triable by the United States magistrate.

Subdivision (c) is amended to reflect the office of United States magistrate.

Subdivision (d) is new. It provides for a remand to the United States magistrate of cases in which the person is charged with a "minor offense." The magistrate can then proceed in accordance with rule 5 to try the case if the right to trial before a judge of the district court is waived.

1974 AMENDMENT

Rule 9 is revised to give high priority to the issuance of a summons unless a "valid reason" is given for the is-

suance of an arrest warrant. See a comparable provision in rule 4.

Under the rule, a summons will issue by the clerk unless the attorney for the government presents a valid reason for the issuance of an arrest warrant. Under the old rule, it has been argued that the court must issue an arrest warrant if one is desired by the attorney for the government. See authorities listed in Frankel, Bench Warrants Upon the Prosecutor's Demand: A View From the Bench, 71 Colum.L.Rev. 403, 410 n. 25 (1971). For an expression of the view that this is undesirable policy, see Frankel, *supra*, pp. 410–415

A summons may issue if there is an information supported by oath. The indictment itself is sufficient to establish the existence of probable cause. See C. Wright, Federal Practice and Procedure: Criminal § 151 (1969); 8 J. Moore, Federal Practice ¶ 9.02 [2] at p. 9–4 (2d ed.) Cipes (1969); Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). This is not necessarily true in the case of an information. See C. Wright, *supra*, § 151; 8 J. Moore, *supra*, ¶ 9.02. If the government requests a warrant rather than a summons, good practice would obviously require the judge to satisfy himself that there is probable cause. This may appear from the information or from an affidavit filed with the information. Also a defendant can, at a proper time, challenge an information issued without probable cause.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247

A. Amendments Proposed by the Supreme Court. Rule 9 of the Federal Rules of Criminal Procedure is closely related to Rule 4. Rule 9 deals with arrest procedures after an information has been filed or an indictment returned. The present rule gives the prosecutor the authority to decide whether a summons or a warrant shall issue.

The Supreme Court's amendments to Rule 9 parallel its amendments to Rule 4. The basic change made in Rule 4 is also made in Rule 9.

B. Committee Action. For the reasons set forth above in connection with Rule 4, the Committee endorses and accepts the basic change in Rule 9. The Committee made changes in Rule 9 similar to the changes it made in Rule 4.

1975 AMENDMENT

Subd. (b)(1). Pub. L. 94–149 substituted reference to "rule 4(c)(1)" for "rule 4(b)(1)".

Subd. (c)(1). Pub. L. 94–149 substituted reference to "rule 4(d) (1), (2), and (3)" for "rule 4(c) (1), (2), and (3)".

EFFECTIVE DATE OF AMENDMENTS PROPOSED APR. 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub.L. 94–64, effective Dec. 1, 1975, see section 2 of Pub.L. 94–64, set out as a note under rule 4 of these rules.

IV. ARRAIGNMENT, AND PREPARATION FOR TRIAL

RULE 11. PLEAS

(a) Alternatives.

A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo Contendere.

A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant.

Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea Is Voluntary.

The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered.

Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) *Acceptance of a Plea Agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a Plea Agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of Plea Agreement Procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of Pleas, Offers of Pleas, and Related Statements.* Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea.

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings.

A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea. (As amended Apr. 22, 1974; July 31, 1975, Pub. L. 94–64, § 3(5)–(10), 89 Stat. 371, 372.)

NOTES OF ADVISORY COMMITTEE ON RULES

1974 AMENDMENT

The amendments to rule 11 are designed to achieve two principal objectives:

(1) Subdivision (c) prescribes the advice which the court must give to insure that the defendant who pleads guilty has made an informed plea.

(2) Subdivision (e) provides a plea agreement procedure designed to give recognition to the propriety of plea discussions; to bring the existence of a plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement.

Other less basic changes are also made. The changes are discussed in the order in which they appear in the rule.

Subdivision (b) retains the requirement that the defendant obtain the consent of the court in order to plead nolo contendere. It adds that the court shall, in deciding whether to accept the plea, consider the views of the prosecution and of the defense and also the larger public interest in the administration of criminal justice.

Although the plea of nolo contendere has long existed in the federal courts, Hudson v. United States, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347 (1926), the desirability of the plea has been a subject of disagreement. Compare Lane-Reticker, Nolo Contendere in North Carolina, 34 N.C.L.Rev. 280, 290–291 (1956), with Note. The Nature and Consequences of the Plea of Nolo Contendere, 33 Neb.L.Rev. 428, 434 (1954), favoring the plea. The American Bar Association Project on Standards for Criminal Justice takes the position that "the case for the nolo plea is not strong enough to justify a minimum standard supporting its use," but because "use of the plea contributes in some degree to the avoidance of unnecessary trials" it does not proscribe use of the plea. ABA, Standards Relating to Pleas of Guilty § 1.1(a) Commentary at 16 (Approved Draft, 1968).

A plea of nolo contendere is, for purposes of punishment, the same as the plea of guilty. See discussion of the history of the nolo plea in North Carolina v. Alford, 400 U.S. 25, 35–36 n. 8, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Note, The Nature and Consequences of the Plea of Nolo Contendere, 33 Neb.L.Rev. 428, 430 (1954). A judgment upon the plea is a conviction and may be used to apply multiple offender statutes. Lenvin and Meyers, Nolo Contendere: Its Nature and Implications, 51 Yale L.J. 1255, 1265 (1942). Unlike a plea of guilty, however, it cannot be used against a defendant as an admission in a subsequent criminal or civil case. 4 Wigmore § 1066(4), at 58 (3d ed. 1940, Supp. 1970); Rules of Evidence for United States Courts and Magistrates, rule 803(22) (Nov. 1971). See Lenvin and Meyers, Nolo Contendere: Its Nature and Implications, 51 Yale L.J. 1255 (1942); ABA Standards Relating to Pleas of Guilty §§ 1.1(a) and (b), Commentary at 15–18 (Approved Draft, 1968).

The factors considered relevant by particular courts in determining whether to permit the plea of nolo contendere vary. Compare United States v. Bagliore, 182 F.Supp. 714, 716 (E.D.N.Y.1960), where the view is taken that the plea should be rejected unless a compelling reason for acceptance is established, with United States v. Jones, 119 F. Supp. 288, 290 (S.D.Cal.1954), where the view is taken that the plea should be accepted in the absence of a compelling reason to the contrary.

A defendant who desires to plead nolo contendere will commonly want to avoid pleading guilty because the plea of guilty can be introduced as an admission in subsequent civil litigation. The prosecution may oppose the plea of nolo contendere because it wants a definite resolution of the defendant's guilty or innocence either for correctional purposes or for reasons of subsequent litigation. ABA Standards Relating to Pleas of Guilty § 1.1(b) Commentary at 16–18 (Approved Draft, 1968). Under subdivision (b) of the new rule the balancing of the interests is left to the trial judge, who is mandated to take into account the larger public interest in the effective administration of justice.

Subdivision (c) retains the requirement that the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. The former rule required that the court determine that the plea was made with "understanding of the nature of the charge and the consequences of the plea." The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty.

Subdivision (c) retains the requirement that the court address the defendant personally. See McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418

(1969). There is also an amendment to rule 43 to make clear that a defendant must be in court at the time of the plea.

Subdivision (c)(1) retains the current requirement that the court determine that the defendant understands the nature of the charge. This is a common requirement. See ABA Standards Relating to Pleas of Guilty § 1.4(a) (Approved Draft, 1968); Illinois Supreme Court Rule 402 (a)(1) (1970), Ill.Rev.Stat.1973, ch. 110A, § 402(a)(1). The method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant. In some cases, a judge may do this by reading the indictment and by explaining the elements of the offense to the defendants. Thompson, The Judge's Responsibility on a Plea of Guilty 62 W.Va.L.Rev. 213, 220 (1960); Resolution of Judges of U.S. District Court for D.C., June 24, 1959.

Former rule 11 required the court to inform the defendant of the "consequences of the plea." Subdivision (c)(2) changes this and requires instead that the court inform the defendant of and determine that he understands "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered." The objective is to insure that a defendant knows what minimum sentence the judge must impose and what maximum sentence the judge may impose. This information is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentence and also the longest possible sentence for the offense to which he is pleading guilty.

It has been suggested that it is desirable to inform a defendant of additional consequences which might follow from his plea of guilty. Durant v. United States, 410 F.2d 689 (1st Cir. 1969), held that a defendant must be informed of his ineligibility for parole. Trujillo v. United States, 377 F.2d 266 (5th Cir. 1967), cert. denied 389 U.S. 899, 88 S.Ct. 224, 19 L.Ed.2d 221 (1967), held that advice about eligibility for parole is not required. It has been suggested that a defendant be advised that a jury might find him guilty only of a lesser included offense. C. Wright, Federal Practice and Procedure: Criminal § 173 at 374 (1969). See contra Dorrough v. United States, 385 F.2d 887 (5th Cir. 1967). The ABA Standards Relating to Pleas of Guilty § 1.4(c)(iii) (Approved Draft, 1968) recommend that the defendant be informed that he may be subject to additional punishment if the offense charged is one for which a different or additional punishment is authorized by reason of the defendant's previous conviction.

Under the rule the judge is not required to inform a defendant about these matters, though a judge is free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant. Currently, certain consequences of a plea of guilty, such as parole eligibility, may be so complicated that it is not feasible to expect a judge to clearly advise the defendant. For example, the judge may impose a sentence under 18 U.S.C. § 4202 making the defendant eligible for parole when he has served one third of the judicially imposed maximum; or, under 18 U.S.C. § 4208 (a)(1), making parole eligibility after a specified period of time less than one third of the maximum; or, under 18 U.S.C. § 4208(a)(2), leaving eligibility to the discretion of the parole board. At the time the judge is required to advise the defendant of the consequences of his plea, the judge will usually not have seen the presentence report and thus will have no basis for giving a defendant any very realistic advice as to when he might be eligible for parole. Similar complications exist with regard to other, particularly collateral, consequences of a plea of guilty in a given case.

Subdivisions (c)(3) and (4) specify the constitutional rights that the defendant waives by a plea of guilty or nolo contendere. These subdivisions are designed to satisfy the requirements of understanding waiver set forth in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Subdivision (c)(3) is intended to require that the judge inform the defendant and determine that he understands that he waives his fifth amendment rights. The rule takes the position that the defendant's right not to incriminate himself is best explained in terms of his right to plead not guilty and to persist in that plea if it has already been made. This is language identical to that adopted in Illinois for the same purpose. See Illinois Supreme Court Rule 402(a)(3) (1970), Ill. Rev.Stat. 1973, ch. 110A, § 402(a)(3).

Subdivision (c)(4) assumes that a defendant's right to have his guilt proved beyond a reasonable doubt and the right to confront his accusers are best explained by indicating that the right to trial is waived. Specifying that there will be no future trial of any kind makes this fact clear to those defendants who, though knowing they have waived trial by jury, are under the mistaken impression that some kind of trial will follow. Illinois has recently adopted similar language. Illinois Supreme Court Rule 402(a)(4) (1970), Ill. Rev.Stat. 1973, ch. 110A, § 402 (a)(4). In explaining to a defendant that he waives his right to trial, the judge may want to explain some of the aspects of trial such as the right to confront witnesses, to subpoena witnesses, to testify in his own behalf, or, if he chooses, not to testify. What is required, in this respect, to conform to Boykin is left to future case-law development.

Subdivision (d) retains the requirement that the court determine that a plea of guilty or nolo contendere is voluntary before accepting it. It adds the requirement that the court also inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior plea discussions between the attorney for the government and the defendant or his attorney. See Santobello v. New York, 404 U.S. 257, 261–262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971): "The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." Subdivisions (d) and (e) afford the court adequate basis for rejecting an improper plea agreement induced by threats or inappropriate promises.

The new rule specifies that the court personally address the defendant in determining the voluntariness of the plea.

By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he will also develop a more complete record to support his determination in a subsequent postconviction attack. * * * Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries. McCarthy v. United States, 394 U.S. 459, 466, 467, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).

Subdivision (e) provides a plea agreement procedure. In doing so it gives recognition to the propriety of plea discussions and plea agreements provided that they are disclosed in open court and subject to acceptance or rejection by the trial judge.

Although reliable statistical information is limited, one recent estimate indicated that guilty pleas account for the disposition of as many as 95% of all criminal cases. ABA Standards Relating to Pleas of Guilty, pp. 1–2 (Approved Draft, 1968). A substantial number of these are the result of plea discussions. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967); D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 3 (1966); L. Weinreb, Criminal Process 437 (1969); Note, Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865 (1964).

There is increasing acknowledgement of both the inevitability and the propriety of plea agreements. See, e.g., ABA Standards Relating to Pleas of Guilty § 3.1 (Approved Draft, 1968); Illinois Supreme Court Rule 402 (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402.

In Brady v. United States, 397 U.S. 742, 752–753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), the court said:

Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for

success in rehabilitation over a shorter period of time than might otherwise be necessary.

In Santobello v. New York, 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971), the court said:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged.

Administratively, the criminal justice system has come to depend upon pleas of guilty and, hence, upon plea discussions. See, e.g., President's Commission on Law Enforcement and Administration of Justice, Task Force Report. The Courts 9 (1967); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865 (1964). But expediency is not the basis for recognizing the propriety of a plea agreement practice. Properly implemented, a plea agreement procedure is consistent with both effective and just administration of the criminal law. Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427. This is the conclusion reached in the ABA Standards Relating to Pleas of Guilty § 1.8 (Approved Draft, 1968); the ABA Standards Relating to The Prosecution Function and The Defense Function pp. 243–253 (Approved Draft, 1971); and the ABA Standards Relating to the Function of the Trial Judge, § 4.1 (App.Draft, 1972). The Supreme Court of California recently recognized the propriety of plea bargaining. See People v. West, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970). A plea agreement procedure has recently been decided in the District of Columbia Court of General Sessions upon the recommendation of the United States Attorney. See 51 F.R.D. 109 (1971).

Where the defendant by his plea aids in insuring prompt and certain application of correctional measures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant. Cf. Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L.J. 204, 211 (1956). Where the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct, it has been thought proper to recognize this in sentencing. See also ALI, Model Penal Code § 7.01 (P.O.D. 1962); NPPA Guides for Sentencing (1957). Granting a charge reduction in return for a plea of guilty may give the sentencing judge needed discretion, particularly where the facts of a case do not warrant the harsh consequences of a long mandatory sentence or collateral consequences which are unduly severe. A plea of guilty avoids the necessity of a public trial and may protect the innocent victim of a crime against the trauma of direct and cross-examination.

Finally, a plea agreement may also contribute to the successful prosecution of other more serious offenders. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial, chs. 2 and 3 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 881 (1964).

Where plea discussions and agreements are viewed as proper, it is generally agreed that it is preferable that the fact of the plea agreement be discolsed in open court and its propriety be reviewed by the trial judge.

We have previously recognized plea bargaining as an ineradicable fact. Failure to recognize it tends not to destroy it but to drive it underground. We reiterate what we have said before: that when plea bargaining occurs it ought to be spread on the record [The Bench Book prepared by the Federal Judicial Center for use by United States District Judges now suggests that the defendant be asked by the court "if he believes there is any understanding or if any predictions have been made to him concerning the sentence he will receive." Bench Book for United States District Judges, Federal Judicial Center (1969) at 1.05.3.] and publicly disclosed. United States v. Williams, 407 F.2d 940 (4th Cir. 1969). * * * In the future we think that the district judges should not only make the general inquiry under Rule 11 as to whether the plea of guilty has been coerced or induced by promises, but should specifically inquire of counsel whether plea bargaining has occurred. Logically the general inquiry should elicit information about plea bargaining, but it seldom has in the past. Raines v. United, 423 F. 2d 526, 530 (4th Cir. 1970).

In the past, plea discussions and agreements have occurred in an informal and largely invisible manner. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 115 (1967). There has often been a ritual of denial that any promises have been made, a ritual in which judges, prosecutors, and defense counsel have participated. ABA Standards Relating to Pleas of Guilty § 3.1, Commentary at 60–69 (Approved Draft 1968); Task Force Report: The Courts 9. Consequently, there has been a lack of effective judicial review of the propriety of the agreements, thus increasing the risk of real or apparent unfairness. See ABA Standards Relating to Pleas of Guilty § 3.1, Commentary at 60 et seq.; Task Force Report: The Courts 9–13.

The procedure described in subdivision (e) is designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.

Subdivision (e)(1) specifies that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may" participate in plea discussions. The inclusion of "the defendant when acting pro se" is intended to reflect the fact that there are situations in which a defendant insists upon representing himself. It may be desirable that an attorney for the government not enter plea discussions with a defendant personnally. If necessary, counsel can be appointed for purposes of plea discussions. (Subdivision (d) makes it mandatory that the court inquire of the defendant whether his plea is the result of plea discussions between him and the attorney for the government. This is intended to enable the court to reject an agreement reached by an unrepresented defendant unless the court is satisfied that acceptance of the agreement adequately protects the rights of the defendant and the interests of justice.) This is substantially the position of the ABA Standards Relating to Pleas of Guilty § 3.1(a), Commentary at 65–66 (Approved Draft, 1968). Apparently, it is the practice of most prosecuting attorneys to enter plea discussions only with defendant's counsel. Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 904 (1964). Discussions without benefit of counsel increase the likelihood that such discussions may be unfair. Some courts have indicated that plea discussions in the absence of defendant's attorney may be constitutionally prohibited. See Anderson v. North Carolina, 221 F.Supp. 930, 935 (W.D.N.C.1963); Shape v. Sigler, 230 F.Supp. 601, 606 (D.Neb.1964).

Subdivision (e)(1) is intended to make clear that there are four possible concessions that may be made in a plea agreement. First, the charge may be reduced to a lesser or related offense. Second, the attorney for the government may promise to move for dismissal of other charges. Third, the attorney for the government may agree to recommend or not oppose the imposition of a particular sentence. Fourth, the attorneys for the government and the defense may agree that a given sentence is an appropriate disposition of the case. This is made explicit in subdivision (e)(2) where reference is made to an agreement made "in the expectation that a specific sentence will be imposed." See Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 898 (1964).

Subdivision (e)(1) prohibits the court from participating in plea discussions. This is the position of the ABA Standards Relating to Pleas of Guilty § 3.3(a) (Approved Draft, 1968).

It has been stated that it is common practice for a judge to participate in plea discussions. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 32–52, 78–104 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891, 905 (1964).

There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a

judge to objectively assess the voluntariness of the plea. See ABA Standards Relating to Pleas of Guilty § 3.3(a), Commentary at 72–74 (Approved Draft, 1968); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891–892 (1964); Comment, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, 32 U.Chi.L.Rev. 167, 180–183 (1964); Informal Opinion No. 779 ABA Professional Ethics Committee ("A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilt based on proof."), 51 A.B. A.J. 444 (1965). As has been recently pointed out:

The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, as once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244, 254 (S.D.N.Y. 1966).

On the other hand, one commentator has taken the position that the judge may be involved in discussions either after the agreement is reached or to help elicit facts and an agreement. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 117–118 (1967).

The amendment makes clear that the judge should not participate in plea discussions leading to a plea agreement. It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court. This is the position of the recently adopted Illinois Supreme Court Rule 402(d)(1) (1970), Ill.Rev.Stat.1973, ch. 110A, § 402(d)(1). As to what may constitute "participation," contrast People v. Earegood, 12 Mich.App. 256, 268–269, 162 N.W.2d 802, 809–810 (1968), with Kruse v. State, 47 Wis.2d 460, 177 N.W.2d 322 (1970).

Subdivision (e)(2) provides that the judge shall require the disclosure of any plea agreement in open court. In People v. West, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970), the court said:

[T]he basis of the bargain should be disclosed to the court and incorporated in the record. * * *

Without limiting that court to those we set forth, we note four possible methods of incorporation: (1) the bargain could be stated orally and recorded by the court reporter, whose notes then must be preserved or transcribed; (2) the bargain could be set forth by the clerk in the minutes of the court; (3) the parties could file a written stipulation stating the terms of the bargain; (4) finally, counsel or the court itself may find it useful to prepare and utilize forms for the recordation of plea bargains. 91 Cal.Rptr. 393, 394, 477 P.2d at 417, 418.

The District of Columbia Court of General Sessions is using a "Sentence-Recommendation Agreement" form.

Upon notice of the plea agreement, the court is given the option to accept or reject the agreement or defer its decision until receipt of the presentence report.

The judge may, and often should, defer his decision until he examines the presentence report. This is made possible by rule 32 which allows a judge, with the defendant's consent, to inspect a presentence report to determine whether a plea agreement should be accepted. For a discussion of the use of conditional plea acceptance, see ABA Standards Relating to Pleas of Guilty § 3.3(b), Commentary at 74–76, and Supplement, Proposed Revisions § 3.3(b) at 2–3 (Approved Draft, 1968); Illinois Supreme Court Rule 402(d)(2) (1970), Ill.Rev. Stat.1973, ch. 110A, § 402(d)(2).

The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.

Subdivision (e)(3) makes is mandatory, if the court decides to accept the plea agreement, that it inform the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement, or one more favorable to the defendant. This serves the purpose of informing the defendant immediately that the agreement will be implemented.

Subdivision (e)(4) requires the court, if it rejects the plea agreement, to inform the defendant of this fact and to advise the defendant personally, in open court, that the court is not bound by the plea agreement. The defendant must be afforded an opportunity to withdraw his plea and must be advised that if he persists in his guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to him than that contemplated by the plea agreement. That the defendant should have the opportunity to withdraw his plea if the court rejects the plea agreement is the position taken in ABA Standards Relating to Pleas of Guilty, Supplement, Proposed Revisions § 2.1(a)(ii)(5) (Approved Draft, 1968). Such a rule has been adopted in Illinois. Illinois Supreme Court Rule 402(d)(2) (1970), Ill.Rev.Stat.1973, ch. 110A, § 402(d)(2).

If the court rejects the plea agreement and affords the defendant the opportunity to withdraw the plea, the court is not precluded from accepting a guilty plea from the same defendant at a later time, when such plea conforms to the requirements of rule 11.

Subdivision (e)(5) makes it mandatory that, except for good cause shown, the court be notified of the existence of a plea agreement at the arraignment or at another time prior to trial fixed by the court. Having a plea entered at this stage provides a reasonable time for the defendant to consult with counsel and for counsel to complete any plea discussions with the attorney for the government. ABA Standards Relating to Pleas of Guilty § 1.3 (Approved Draft, 1968). The objective of the provision is to make clear that the court has authority to require a plea agreement to be disclosed sufficiently in advance of trial so as not to interfer with the efficient scheduling of criminal cases.

Subdivision (e)(6) is taken from rule 410, Rules of Evidence for United States Courts and Magistrates (Nov. 1971). See Advisory Committee Note thereto. See also the ABA Standards Relating to Pleas of Guilty § 2.2 (Approved Draft, 1968); Illinois Supreme Court Rule 402(f) (1970), Ill. Rev. Stat. 1973, ch. 110A, § 402(f).

Subdivision (f) retains the requirement of old rule 11 that the court should not enter judgment upon a plea of guilty without making such an inquiry as will satisfy it that there is a factual basis for the plea. The draft does not specify that any particular type of inquiry be made. See Santobello v. New York, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); "Fed.Rule Crim.Proc. 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." An inquiry might be made of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case. This is the position of the ABA Standards Relating to Pleas of Guilty § 1.6 (Approved Draft, 1968). Where inquiry is made of the defendant himself it may be desirable practice to place the defendant under oath. With regard to a determination that there is a factual basis for a plea of guilty to a "lessor or related offense," compare ABA Standards Relating to Pleas of Guilty § 3.1(b)(ii), Commentary at 67–68 (Approved Draft, 1968), with ALI, Model Penal Code § 1.07(5) (P.O.D.1962). The rule does not speak directly to the issue of whether a judge may accept a plea of guilty where there is a factual basis for the plea but the defendant asserts his innocence. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The procedure in such case would seem to be to deal with this as a plea of nolo contendere, the acceptance of which would depend upon the judge's decision as to whether acceptance of the plea is consistent with "the interest of the public in the effective administration of justice" [new rule 11(b)]. The defendant who asserts his innocence while pleading guilty or nolo contendere is often difficult to deal with in a correctional setting, and it may therefore be preferable to resolve the issue of guilt

or innocence at the trial stage rather than leaving that issue unresolved, thus complicating subsequent correctional decisions. The rule is intended to make clear that a judge may reject a plea of nolo contendere and require the defendant either to plead not guilty or to plead guilty under circumstances in which the judge is able to determine that the defendant is in fact guilty of the crime to which he is pleading guilty.

Subdivision (g) requires that a verbatim record be kept of the proceedings. If there is a plea of guilty or nolo contendere, the record must include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea and the plea agreement, and the inquiry into the accuracy of the plea. Such a record is important in the event of a postconviction attack. ABA Standards Relating to Pleas of Guilty § 1.7 (Approved Draft, 1968). A similar requirement was adopted in Illinois: Illinois Supreme Court Rule 402(e) (1970), Ill.Rev.Stat.1973, ch. 110A, § 402(e).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT No. 94–247

A. Amendments Proposed by the Supreme Court. Rule 11 of the Federal Rules of Criminal Procedure deals with pleas. The Supreme Court has proposed to amend this rule extensively.

Rule 11 provides that a defendant may plead guilty, not guilty, or nolo contendere. The Supreme Court's amendments to Rule 11(b) provide that a nolo contendere plea "shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."

The Supreme Court amendments to Rule 11(c) spell out the advise that the court must give to the defendant before accepting the defendant's plea of guilty or nolo contendere. The Supreme Court amendments to Rule 11(d) set forth the steps that the court must take to insure that a guilty or nolo contendere plea has been voluntarily made.

The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning the disposition of the case. The procedure is not mandatory; a court is free not to permit the parties to present plea agreements to it.

The Supreme Court amendments to Rule 11(f) require that the court, before entering judgment upon a plea of guilty, satisfy itself that "there is a factual basis for the plea." The Supreme Court amendments to Rule 11(g) require that a verbatim record be kept of the proceedings at which the defendant enters a plea.

B. Committee Action. The proposed amendments to Rule 11, particularly those relating to the plea negotiating procedure, have generated much comment and criticism. No observer is entirely happy that our criminal justice system must rely to the extent it does on negotiated dispositions of cases. However, crowded court dockets make plea negotiating a fact that the Federal Rules of Criminal Procedure should contend with. The Committee accepts the basic structure and provisions of Rule 11(e).

Rule 11(e) as proposed permits each federal court to decide for itself the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea negotiations and agreements if, and to the extent that, the court permits such negotiations and agreements. [Proposed Rule 11(e) has been criticized by some federal judges who read it to mandate the court to permit plea negotiations and the reaching of plea agreements. The Advisory Committee stressed during its testimony that the rule does not mandate that a court permit any form of plea agreement to be presented to it. See, e.g., the remarks of United States Circuit Judge William H. Webster in Hearings II, at 196. See also the exchange of correspondence between Judge Webster and United States District Judge Frank A. Kaufman in Hearings II, at 289–90.]

Proposed Rule 11(e) contemplates 4 different types of plea agreements. First, the defendant can plead guilty or nolo contendere in return for the prosecutor's reducing the charge to a less serious offense. Second, the defendant can plead guilty or nolo contendere in return for the prosecutor dropping, or not bringing, a charge or charges relating to other offenses. Third, the defendant can plead guilty or nolo contendere in return for the prosecutor's recommending a sentence. Fourth, the defendant and prosecutor can agree that a particular sentence is the appropriate disposition of the case. [It is apparent, though not explicitly stated, that Rule 11(e) contemplates that the plea agreement may bind the defendant to do more than just plead guilty or nolo contendere. For example, the plea agreement may bind the defendant to cooperate with the prosecution in a different investigation. The Committee intends by its approval of Rule 11(e) to permit the parties to agree on such terms in a plea agreement.]

The Committee added language in subdivisions (e)(2) and (e)(4) to permit a plea agreement to be disclosed to the court, or rejected by it, in camera. There must be a showing of good cause before the court can conduct such proceedings in camera. The language does not address itself to whether the showing of good cause may be made in open court or in camera. That issue is left for the courts to resolve on a case-by-case basis. These changes in subdivisions (e)(2) and (e)(4) will permit a fair trial when there is substantial media interest in a case and the court is rejecting a plea agreement.

The Committee added an exception to subdivision (e)(6). That subdivision provides:

> Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

The Committee's exception permits the use of such evidence in a perjury or false statement prosecution where the plea, offer, or related statement was made by the defendant on the record, under oath and in the presence of counsel. The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes hat, on balance, it is more important to protect the integrity of the judicial process from willful deceit and untruthfulness. [The Committee does not intend its language to be construed as mandating or encouraging the swearing-in of the defendant during proceedings in connection with the disclosure and acceptance or rejection of a plea agreement.]

The Committee recast the language of Rule 11(c), which deals with the advice given to a defendant before the court can accept his plea of guilty or nolo contendere. The Committee acted in part because it believed that the warnings given to the defendant ought to include those that Boykin v. Alabama, 395 U.S. 238 (1969), said were constitutionally required. In addition, and as a result of its change in subdivision (e)(6), the Committee thought if only fair that the defendant be warned that his plea of guilty (later withdrawn) or nolo contendere, or his offer of either plea, or his statements made in connection with such pleas or offers, could later be used against him in a perjury trial if made under oath, on the record, and in the presence of counsel.

CONFERENCE COMMITTEE NOTICE, HOUSE REPORT No. 94–414

Note to subdivision (c). Rule 11(c) enumerates certain things that a judge must tell a defendant before the judge can accept that defendant's plea of guilty or nolo contendere. The House version expands upon the list originally proposed by the Supreme Court. The Senate version adopts the Supreme Court's proposal.

The Conference adopts the House provision.

Note to subdivision (e)(1). Rule 11(e)(1) outlines some general considerations concerning the plea agreement procedure. The Senate version makes nonsubstantive change in the House version.

The Conference adopts the Senate provision.

Note to subdivision (e)(6). Rule 11(e)(6) deals with the use of statements made in connection with plea agreements. The House version permits a limited use of pleas of guilty, later withdrawn, or nolo contendere,

offers of such pleas, and statements made in connection with such pleas or offers. Such evidence can be used in a perjury or false statement prosecution if the plea, offer, or related statement was made under oath, on the record, and in the presence of counsel. The Senate version permits evidence of voluntary and reliable statements made in court on the record to be used for the purpose of impeaching the credibility of the declarant or in a perjury or false statement prosecution.

The Conference adopts the House version with changes. The Conference agrees that neither a plea nor the offer of a plea ought to be admissible for any purpose. The Conference-adopted provision, therefore, like the Senate provision, permits only the use of statements made in connection with a plea of guilty, later withdrawn, or a plea of nolo contendere, or in connection with an offer of a guilty or nolo contendere plea.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APR. 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, except with respect to the amendment adding subd. (e)(6) of this rule, effective Aug. 1, 1975, see section 2 of Pub.L. 94–64, set out as a note under rule 4 of these rules.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

(a) Pleadings and Motions.

Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial Motions.

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) Motion Date.

Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

(d) Notice by the Government of the Intention To Use Evidence.

(1) *At the Discretion of the Government.* At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(2) *At the Request of the Defendant.* At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(e) Ruling on Motion.

A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) Effect of Failure To Raise Defenses or Objections.

Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) Records.

A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) Effect of Determination.

If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations. (As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94–64, § 3 (11), (12), 89 Stat. 372.)

NOTES OF ADVISORY COMMITTEE ON RULES

1974 AMENDMENT

Subdivision (a) remains as it was in the old rule. It "speaks only of defenses and objections that prior to the rules could have been raised by a plea, demurrer, or motion to quash" (C. Wright, Federal Practice and Procedure: Criminal § 191 at p. 397 (1969)), and this might be interpreted as limiting the scope of the rule. However, some courts have assumed that old rule 12 does apply to pretrial motions generally, and the amendments to subsequent subdivisions of the rule should make clear that the rule is applicable to pretrial motion practice generally. (See e.g., rule 12(b)(3), (4), (5) and rule 41(e).)

Subdivision (b) is changed to provide for some additional motions and requests which must be made prior to trial. Subdivisions (b)(1) and (2) are restatements of the old rule.

Subdivision (b)(3) makes clear that objections to evidence on the ground that it was illegally obtained must be raised prior to trial. This is the current rule with regard to evidence obtained as a result of an illegal search. See rule 41(e); C. Wright, Federal Practice and Procedure: Criminal § 673 (1969, Supp. 1971). It is also the practice with regard to other forms of illegality such

as the use of unconstitutional means to obtain a confession. See C. Wright, Federal Practice and Procedure: Criminal § 673 at p. 108 (1969). It seems apparent that the same principle should apply whatever the claimed basis for the application of the exclusionary rule of evidence may be. This is consistent with the court's statement in Jones v. United States, 362 U.S. 257, 264, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960):

This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt. (Emphasis added.)

Subdivision (b)(4) provides for a pretrial request for discovery by either the defendant or the government to the extent to which such discovery is authorized by rule 16.

Subdivision (b)(5) provides for a pretrial request for a severance as authorized in rule 14.

Subdivision (c) provides that a time for the making of motions shall be fixed at the time of the arraignment or as soon thereafter as practicable by court rule or direction of a judge. The rule leaves to the individual judge whether the motions may be oral or written. This and other amendments to rule 12 are designed to make possible and to encourage the making of motions prior to trial, whenever possible, and in a single hearing rather than in a series of hearings. This is the recommendation of the American Bar Association's Committee on Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970); see especially §§ 5.2 and 5.3. It also is the procedure followed in those jurisdictions which have used the so-called "omnibus hearing" originated by Judge James Carter in the Southern District of California. See 4 Defender Newsletter 44 (1967); Miller, The Omnibus Hearing—An Experiment in Federal Criminal Discovery, 5 San Diego L.Rev. 293 (1968); American Bar Association, Standards Relating to Discovery and Procedure Before Trial, Appendices B, C, and D (Approved Draft, 1970). The omnibus hearing is also being used, on an experimental basis, in several other district courts. Although the Advisory Committee is of the view that it would be premature to write the omnibus hearing procedure into the rules, it is of the view that the single pretrial hearing should be made possible and its use encouraged by the rules.

There is a similar trend in state practice. See, e.g., State ex rel. Goodchild v. Burke, 27 Wis.2d 244, 133 N.W.2d 753 (1965); State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965).

The rule provides that the motion date be set at "the arraignment or as soon thereafter as practicable." This is the practice in some federal courts including those using the omnibus hearing. (In order to obtain the advantage of the omnibus hearing, counsel routinely plead not guilty at the initial arraignment on the information or indictment and then may indicate a desire to change the plea to guilty following the omnibus hearing. This practice builds a more adequate record in guilty plea cases.) The rule further provides that the date may be set before the arraignment if local rules of court so provide.

Subdivision (d) provides a mechanism for insuring that a defendant knows of the government's intention to use evidence to which the defendant may want to object. On some occasions the resolution of the admissibility issue prior to trial may be advantageous to the government. In these situations the attorney for the government can make effective defendant's obligation to make his motion to suppress prior to trial by giving defendant notice of the government's intention to use certain evidence. For example, in United States v. Desist, 384 F.2d 889, 897 (2d Cir. 1967), the court said:

Early in the pre-trial proceedings, the Government commendably informed both the court and defense counsel that an electronic listening device had been used in investigating the case, and suggested a hearing be held as to its legality.

See also the "Omnibus Crime Control and Safe Streets Act of 1968," 18 U.S.C. § 2518 (9):

The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved.

In cases in which defendant wishes to know what types of evidence the government intends to use so that he can make his motion to suppress prior to trial, he can request the government to give notice of its intention to use specified evidence which the defendant is entitled to discover under rule 16. Although the defendant is already entitled to discovery of such evidence prior to trial under rule 16, rule 12 makes it possible for him to avoid the necessity of moving to suppress evidence which the government does not intend to use. No sanction is provided for the government's failure to comply with the court's order because the committee believes that attorneys for the government will in fact comply and that judges have ways of insuring compliance. An automatic exclusion of such evidence, particularly where the failure to give notice was not deliberate, seems to create too heavy a burden upon the exclusionary rule of evidence, especially when defendant has opportunity for broad discovery under rule 16. Compare ABA Project on Standards for Criminal Justice, Standards Relating to Electronic Surveillance (Approved Draft, 1971) at p. 116:

A failure to comply with the duty of giving notice could lead to the suppression of evidence. Nevertheless, the standards make it explicit that the rule is intended to be a matter of procedure which need not under appropriate circumstances automatically dictate that evidence otherwise admissible be suppressed.

Pretrial notice by the prosecution of its intention to use evidence which may be subject to a motion to suppress is increasingly being encouraged in state practice. See, e.g., State ex rel. Goodchild v. Burke, 27 Wis.2d 244, 264, 133 N.W.2d 753, 763 (1965):

In the interest of better administration of criminal justice we suggest that wherever practicable the prosecutor should within a reasonable time before trial notify the defense as to whether any alleged confession or admission will be offered in evidence at the trial. We also suggest, in cases where such notice is given by the prosecution, that the defense, if it intends to attack the confession or admission as involuntary, notify the prosecutor of a desire by the defense for a special determination on such issue.

See also State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 553–556, 141 N.W.2d 3, 13–15 (1965):

At the time of arraignment when a defendant pleads not guilty, or as soon as possible thereafter, the state will advise the court as to whether its case against the defendant will include evidence obtained as the result of a search and seizure; evidence discovered because of a confession or statements in the nature of a confession obtained from the defendant; or confessions or statements in the nature of confessions.

Upon being so informed, the court will formally advise the attorney for the defendant (or the defendant himself if he refuses legal counsel) that he may, if he chooses, move the court to suppress the evidence so secured or the confession so obtained if his contention is that such evidence was secured or confession obtained in violation of defendant's constitutional rights. * * *

The procedure which we have outlined deals only with evidence obtained as the result of a search and seizure and evidence consisting of or produced by confession on the part of the defendant. However, the steps which have been sugegsted as a method of dealing with evidence of this type will indicate to counsel and to the trial courts that the pretrial consideration of other evidentiary problems, the resolution of which is needed to assure the integrity of the trial when conducted, will be most useful and that this court encourages the use of such procedures whenever practical.

Subdivision (e) provides that the court shall rule on a pretrial motion before trial unless the court orders that it be decided upon at the trial of the general issue or after verdict. This is the old rule. The reference to issues which must be tried by the jury is dropped as unnecessary, without any intention of changing current law or practice. The old rule begs the question of when a jury decision

is required at the trial, providing only that a jury is necessary if "required by the Constitution or an act of Congress." It will be observed that subdivision (e) confers general authority to defer the determination of any pretrial motion until after verdict. However, in the case of a motion to suppress evidence the power should be exercised in the light of the possibility that if the motion is ultimately granted a retrial of the defendant may not be permissible.

Subdivision (f) provides that a failure to raise the objections or make the requests specified in subdivision (b) constitutes a waiver thereof, but the court is allowed to grant relief from the waiver if adequate cause is shown. See C. Wright, Federal Practice and Procedure: Criminal § 192 (1969), where it is pointed out that the old rule is unclear as to whether the waiver results only from a failure to raise the issue prior to trial or from the failure to do so at the time fixed by the judge for a hearing. The amendment makes clear that the defendant and, where appropriate, the government have an obligation to raise the issue at the motion date set by the judge pursuant to subdivision (c).

Subdivision (g) requires that a verbatim record be made of pretrial motion proceedings and requires the judge to make a record of his findings of fact and conclusions of law. This is desirable if pretrial rulings are to be subject to post-conviction review on the record. The judge may find and rule orally from the bench, so long as a verbatim record is taken. There is no necessity of a separate written memorandum containing the judge's findings and conclusions.

Subdivision (h) is essentially old rule 12(b)(5) except for the deletion of the provision that defendant may plead if the motion is determined adversely to him or, if he has already entered a plea, that that plea stands. This language seems unnecessary particularly in light of the experience in some district courts where a pro forma plea of not guilty is entered at the arraignment, pretrial motions are later made, and depending upon the outcome the defendant may then change his plea to guilty or persist in his plea of not guilty.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247

A. Amendments Proposed by the Supreme Court. Rule 12 of the Federal Rules of Criminal Procedure deals with pretrial motions and pleadings. The Supreme Court proposed several amendments to it. The more significant of these are set out below.

Subdivision (b) as proposed to be amended provides that the pretrial motions may be oral or written, at the court's discretion. It also provides that certain types of motions must be made before trial.

Subdivision (d) as proposed to be amended provides that the government, either on its own or in response to a request by the defendant, must notify the defendant of its intention to use certain evidence in order to give the defendant an opportunity before trial to move to suppress that evidence.

Subdivision (e) as proposed to be amended permits the court to defer ruling on a pretrial motion until the trial of the general issue or until after verdict.

Subdivision (f) as proposed to be amended provides that the failure before trial to file motions or requests or to raise defenses which must be filed or raised prior to trial, results in a waiver. However, it also provides that the court, for cause shown, may grant relief from the waiver.

Subdivision (g) as proposed to be amended requires that a verbatim record be made of the pretrial motion proceedings and that the judge make a record of his findings of fact and conclusions of law.

B. Committee Action. The Committee modified subdivision (e) to permit the court to defer its ruling on a pretrial motion until after the trial only for good cause. Moreover, the court cannot defer its ruling if to do so will adversely affect a party's right to appeal. The Committee believes that the rule proposed by the Supreme Court could deprive the government of its appeal rights under statutes like section 3731 of title 18 of the United States Code. Further, the Committee hopes to discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make a ruling unnecessary.

The Committee also modified subdivision (h), which deals with what happens when the court grants a pretrial motion based upon a defect in the institution of the prosecution or in the indictment or information. The Committee's change provides that when such a motion is granted, the court may order that the defendant be continued in custody or that his bail be continued for a specified time. A defendant should not automatically be continued in custody when such a motion is granted. In order to continue the defendant in custody, the court must not only determine that there is probable cause, but it must also determine, in effect, that there is good cause to have the defendant arrested.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APR. 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

RULE 12.1. NOTICE OF ALIBI

(a) Notice by Defendant.

Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(b) Disclosure of Information and Witness.

Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(c) Continuing Duty To Disclose.

If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.

(d) Failure To Comply.

Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

(e) Exceptions.

For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.

(f) Inadmissibility of Withdrawn Alibi.

Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention. (Added Apr. 22, 1974, eff. Dec. 1, 1975, and amended July 31, 1975, Pub. L. 94–64, § 3(13), 89 Stat. 372.)

NOTES OF ADVISORY COMMITTEE ON RULES

Rule 12.1 is new. See rule 87 of the United States District Court Rules for the District of Columbia for a somewhat comparable provision.

The Advisory Committee has dealt with the issue of notice of alibi on several occasions over the course of the past three decades. In the Preliminary Draft of the Federal Rules of Criminal Procedure, 1943, and the Second Preliminary Draft, 1944, an alibi-notice rule was proposed. But the Advisory Committee was closely divided upon whether there should be a rule at all and, if there were to be a rule, what the form of the rule should be. Orfield, The Preliminary Draft of the Federal Rules of Criminal Procedure, 22 Texas L.Rev. 37, 57–58 (1943). The principal State statutes and court rules are cited in 399 U.S. at 82 n. 11, 90 S.Ct. 1893. See also Epstein, supra.

Rule 12.1 will serve a useful purpose even though rule 16 now requires disclosure of the names and addresses of government and defense witnesses. There are cases in which the identity of defense witnesses may be known, but it may come as a surprise to the government that they intend to testify as to an alibi and there may be no advance notice of the details of the claimed alibi. The result often is an unnecessary interruption and delay in the trial to enable the government to conduct an appropriate investigation. The objective of rule 12.1 is to prevent this by providing a mechanism which will enable the parties to have specific information in advance of trial to prepare to meet the issue of alibi during the trial.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247

A. Amendments Proposed by the Supreme Court. Rule 12.1 is a new rule that deals with the defense of alibi. It provides that a defendant must notify the government of his intention to rely upon the defense of alibi. Upon receipt of such notice, the government must advise the defendant of the specific time, date, and place at which the offense is alleged to have been committed. The defendant must then inform the government of the specific place at which he claims to have been when the offense is alleged to have been committed, and of the names and addresses of the witnesses on whom he intends to rely to establish his alibi. The government must then inform the defendant of the names and addresses of the witnesses on whom it will rely to establish the defendant's presence at the scene of the crime. If either party fails to comply with the provisions of the rule, the court may exclude the testimony of any witness whose identity is not disclosed. The rule does not attempt to limit the right of the defendant to testify in his own behalf.

B. Committee Action. The Committee disagrees with the defendant-triggered procedures of the rule proposed by the Supreme Court. The major purpose of a notice-of-alibi rule is to prevent unfair surprise to the prosecution. The Committee, therefore, believes that it should be up to the prosecution to trigger the alibi defense discovery procedures. If the prosecution is worried about being surprised by an alibi defense, it can trigger the alibi defense discovery procedures. If the government fails to trigger the procedures and if the defendant raises an alibi defense at trial, then the government cannot claim surprise and get a continuance of the trial.

The Committee has adopted a notice-of-alibi rule similar to the one now used in the District of Columbia. [See Rule 2–5(b) of the Rules of the United States District Court for the District of Columbia. See also Rule 16–1 of the Rules of Criminal Procedure for the Superior Court of the District of Columbia.] The rule is prosecution-triggered. If the prosecutor notifies the defendant of the time, place, and date of the alleged offense, then the defendant has 10 days in which to notify the prosecutor of his intention to rely upon an alibi defense, specify where he claims to have been at the time of the alleged offense, and provide a list of his alibi witnesses. The prosecutor, within 10 days but no later than 10 days before trial, must then provide the defendant with a list of witnesses who will place the defendant at the scene of the alleged crime and those witnesses who will be used to rebut the defendant's alibi witnesses.

The Committee's rule does not operate only to the benefit of the prosecution. In fact, its rule will provide the defendant with more information than the rule proposed by the Supreme Court. The rule proposed by the Supreme Court permits the defendant to obtain a list of only those witnesses who will place him at the scene of the crime. The defendant, however, would get the names of these witnesses anyway as part of his discovery under Rule 16 (a)(1)(E). The Committee rule not only requires the prosecution to provide the names of witnesses who place the defendant at the scene of the crime, but it also requires the prosecution to turn over the names of those witnesses who will be called in rebuttal to the defendant's alibi witnesses. This is information that the defendant is not otherwise entitled to discover.

EFFECTIVE DATE OF RULE; EFFECTIVE DATE OF 1975 AMENDMENTS

This rule, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

RULE 12.2. NOTICE OF DEFENSE BASED UPON MENTAL CONDITION

(a) Defense of Insanity.

If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Mental Disease or Defect Inconsistent With the Mental Element Required for the Offense Charged.

If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Psychiatric Examination.

In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

(d) Failure To Comply.

If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state. (Added Apr. 22, 1974, eff. Dec. 1, 1975, and amended July 31, 1975, Pub. L. 94–64, § 3(14), 89 Stat. 373.)

NOTES OF ADVISORY COMMITTEE ON RULES

Rule 12.2 is designed to require a defendant to give notice prior to trial of his intention (1) to rely upon the defense of insanity or (2) to introduce expert testimony of mental disease or defect on the theory that such mental condition is inconsistent with the mental state required for the offense charged. This rule does not deal with the issue of mental competency to stand trial.

The objective is to give the government time to prepare to meet the issue, which will usually require reliance upon expert testimony. Failure to give advance notice commonly results in the necessity for a continuance in the middle of a trial, thus unnecessarily delaying the administration of justice.

A requirement that the defendant give notice of his intention to rely upon the defense of insanity was proposed by the Advisory Committee in the Second Preliminary Draft of Proposed Amendments (March 1964), rule 12.1, p. 7. The objective of the 1964 proposal was explained in a brief Advisory Committee Note:

Under existing procedure although insanity is a defense, once it is raised the burden to prove sanity beyond a reasonable doubt rests with the government. Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895). This rule requires pretrial notice to the government of an insanity defense, thus permitting it to prepare to meet the issue. Furthermore, in Lynch v. Overholser, 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962), the Supreme Court held that, at least in the face of a mandatory commitment statute, the defendant had a right to determine whether or not to raise the issue of insanity. The rule gives the defendant a method of raising the issue and precludes any problem of deciding whether or not the defendant relied on insanity.

The Standing Committee on Rules of Practice and Procedure decided not to recommend the proposed Notice of Insanity rule to the Supreme Court. Reasons were not given.

Requiring advance notice of the defense of insanity is commonly recommended as a desirable procedure. The Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. 1, p. 254 (1970), state in part:

> It is recommended that procedural reform provide for advance notice that evidence of mental disease or defect will be relied upon in defense. . . .

Requiring advance notice is proposed also by the American Law Institute's Model Penal Code, § 4.03 (P.O.D.1962). The commentary in Tentative Draft No. 4 at 193–194 (1955) indicates that, as of that time, six states required pretrial notice and an additional eight states required that the defense of insanity be specially pleaded.

For recent state statutes see N.Y. CPL § 250.10 (McKinney's Consol. Laws, c. 11–A, 1971) enacted in 1970 which provides that no evidence by a defendant of a mental disease negativing criminal responsibility shall be allowed unless defendant has served notice on the prosecutor of his intention to rely upon such defense. See also New Jersey Penal Code (Final Report of the New Jersey Criminal Law Revision Commission, Oct. 1971) § 2c: 4–3; New Jersey Court Rule 3:12; State v. Whitlow, 45 N.J. 3, 22 n. 3, 210 T.2d 763 (1965), holding the requirement of notice to be both appropriate and not in violation of the privilege against self-incrimination.

Subdivision (a) deals with notice of the "defense of instanity." In this context the term insanity has a well-understood meaning. See, e.g., Tydings, A Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure, 27 Md.L.Rev. 131 (1967). Precisely how the defense of insanity is phrased does, however, differ somewhat from circuit to circuit. See Study Draft of a New Federal Criminal Code, § 503 Comment at 37 (USGPO 1970). For a more extensive discussion of present law, see Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. 1, pp. 229–247 (USGPO 1970). The National Commission recommends the adoption of a single test patterned after the proposal of the American Law Institute's Model Penal Code. The proposed definition provides in part:

> In any prosecution for an offense lack of criminal responsibility by reason of mental disease or defect is a defense. [Study Draft of a New Federal Criminal Code § 503 at 36–37.]

Should the proposal of the National Commission be adopted by the Congress, the language of subdivision (a) probably ought to be changed to read "defense of lack of criminal responsibility by reason of mental disease or defect" rather than "defense of insanity."

Subdivision (b) is intended to deal with the issue of expert testimony bearing upon the issue of whether the defendant had the "mental state required for the offense charged."

There is some disagreement as to whether it is proper to introduce evidence of mental disease or defect bearing not upon the defense of insanity, but rather upon the existence of the mental state required by the offense charged. The American Law Institute's Model Penal Code takes the position that such evidence is admissible [§ 4.02(1) (P.O.D. 1962)]. See also People v. Gorshen, 51 Cal.2d 716, 336 P.2d 492 (1959).

The federal cases reach conflicting conclusions. See Rhodes v. United States, 282 F.2d 59, 62 (4th Cir. 1960):

> The proper way would have been to ask the witness to describe the defendant's mental condition and symptoms, his pathological beliefs and motivations, if he was thus afflicted, and to explain how these influenced or could have influenced his behavior, particularly his mental capacity knowingly to make the false statement charged, or knowingly to forge the signatures * * *.

Compare Fisher v. United States, 328 U.S. 463, 66 S.Ct. 1318, 90 L.Ed. 1382 (1946).

Subdivision (b) does not attempt to decide when expert testimony is admissible on the issue of the requisite mental state. It provides only that the defendant must give pretrial notice when he intends to introduce such evidence. The purpose is to prevent the need for a continuance when such evidence is offered without prior notice. The problem of unnecessary delay has arisen in jurisdictions which do not require prior notice of an intention to use expert testimony on the issue of mental state. Referring to this, the California Special Commission on Insanity and Criminal Offenders, First Report 30 (1962) said:

> The abuses of the present system are great. Under a plea of "not guilty" without any notice to the people that the defense of insanity will be relied upon, defendant has been able to raise the defense upon the trial of the issue as to whether he committed the offense charged.

As an example of the delay occasioned by the failure to heretofore require a pretrial notice by the defendant, see United States v. Albright, 388 F.2d 719 (4th Cir. 1968), where a jury trial was recessed for 23 days to permit a psychiatric examination by the prosecution when the defendant injected a surprise defense of lack of mental competency.

Subdivision (c) gives the court the authority to order the defendant to submit to a psychiatric examination by a psychiatrist designated by the court. A similar provision is found in ALI, Model Penal Code § 4.05(1) (P.O.D.1962). This is a common provision of state law, the constitutionality of which has been sustained. Authorities are collected in ALI, Model Penal Code, pp. 195–196 Tent. Draft No. 4, (1955). For a recent proposal, see the New Jersey Penal Code § 2c: 4–5 (Final Report of the New Jersey Criminal Law Revision Commission, Oct. 1971) authorizing appointment of "at least one qualified psychiatrist to examine and report upon the mental condition of the defendant." Any issue of self-incrimination which might arise can be dealt with by the court as, for example, by a bifurcated trial which deals separately with the issues

of guilt and of mental responsibility. For statutory authority to appoint a psychiatrist with respect to competency to stand trial, see 18 U.S.C. § 4244.

Subdivision (d) confers authority on the court to exclude expert testimony in behalf of a defendant who has failed to give notice under subdivision (b) or who refuses to be examined by a court-appointed psychiatrist under subdivision (c). See State v. Whitlow, 45 N.J. 3, 23, 210 A.2d 763 (1965), which indicates that it is proper to limit or exclude testimony by a defense psychiatrist whenever defendant refuses to be examined.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT No. 94–247

A. Amendments Proposed by the Supreme Court. Rule 12.2 is a new rule that deals with defense based upon mental condition. It provides that: (1) The defendant must notify the prosecution in writing of his intention to rely upon the defense of insanity. If the defendant fails to comply, "insanity may not be raised as a defense." (2) If the defendant intends to introduce expert testimony relating to mental disease or defect on the issue whether he had the requisite mental state, he must notify the prosecution in writing. (3) The court, on motion of the prosecution, may order the defendant to submit to a psychiatric examination by a court-appointed psychiatrist. (4) If the defendant fails to undergo the court-ordered psychiatric examination, the court may exclude any expert witness the defendant offers on the issue of his mental state.

B. Committee Action. The Committee agrees with the proposed rule but has added language concerning the use of statements made to a psychiatrist during the course of a psychiatric examination provided for by Rule 12.2. The language provides:

> No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused before the judge who or jury which determines the guilt of the accused, prior to the determination of guilt.

The purpose of this rule is to secure the defendant's fifth amendment right against self-incrimination. See State v. Raskin, 34 Wis.2d 607, 150 N.W.2d 318 (1967). The provision is flexible and does not totally preclude the use of such statements. For example, the defendant's statement can be used at a separate determination of the issue of sanity or for sentencing purposes once guilt has been determined. A limiting instruction to the jury in a single trial to consider statements made to the jury in a single on the issue of sanity would not satisfy the requirements of the rule as amended. The prejudicial effect on the determination of guilt would be inescapable.

The Committee notes that the rule does not attempt to resolve the issue whether the court can constitutionally compel a defendant to undergo a psychiatric examination when the defendant is unwilling to undergo one. The provisions of subdivision (c) are qualified by the phrase, "In an appropriate case." If the court cannot constitutionally compel an unwilling defendant to undergo a psychiatric examination, then the provisions of subdivision (c) are inapplicable in every instance where the defendant is unwilling to undergo a court-ordered psychiatric examination. The Committee, by its approval of subdivision (c), intends to take no stand whatever on the constitutional question.

CONFERENCE COMMITTEE NOTES, HOUSE REPORT No. 94–414

Rule 12.2(c) deals with court-ordered psychiatric examinations. The House version provides that no statement made by a defendant during a court-ordered psychiatric examination could be admitted in evidence against the defendant before the trier of fact that determines the issue of guilt prior to the determination of guilt. The Senate version deletes this provision.

The Conference adopts a modified House provision and restores to the bill the language of H.R. 6799 as it was originally introduced. The Conference adopted language provides that no statement made by the defendant during a psychiatric examination provided for by the rule shall be admitted against him on the issue of guilt in any criminal proceeding.

The Conference believes that the provision in H.R. 6799 as originally introduced in the House adequately protects the defendant's fifth amendment right against self-incrimination. The rule does not preclude use of statements made by a defendant during a court-ordered psychiatric examination. The statements may be relevant to the issue of defendant's sanity and admissable on that issue. However, a limiting instruction would not satisfy the rule if a statement is so prejudicial that a limiting instruction would be ineffective. Cf. practice under 18 U.S.C. 4244.

EFFECTIVE DATE OF RULE; EFFECTIVE DATE OF 1975 AMENDMENTS

This rule, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

RULE 15. DEPOSITIONS

(a) When Taken.

Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of Taking.

The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) Payment of Expenses.

Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence

of the defendant and his attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) How Taken.

Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use.

At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to Deposition Testimony.

Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) Deposition by Agreement Not Precluded.

Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court. (As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94–64, § 3(15)–(19), 89 Stat. 373, 374.)

NOTES OF ADVISORY COMMITTEE ON RULES

1974 AMENDMENT

Rule 15 authorizes the taking of depositions by the government. Under former rule 15 only a defendant was authorized to take a deposition.

The revision is similar to Title VI of the Organized Crime Control Act of 1970. The principal difference is that Title VI (18 U.S.C. § 3503) limits the authority of the government to take depositions to cases in which the Attorney General certifies that the "proceeding is against a person who is believevd to have participated in an organized criminal activity." This limitation is not contained in rule 15.

Dealing with the issue of government depositions so soon after the enactment of 18 U.S.C. § 3503 is not inconsistent with the congressional purpose. On the floor of the House Congressman Poff, a principal spokesman for the proposal, said that the House version was not designed to "limit the Judicial Conference of the United States in the exercise of its rulemaking authority . . . from addressing itself to other problems in this area or from adopting a broader approach." 116 Cong.Rec. 35293 (1970).

The recently enacted Title VI of the Organized Crime Control Act of 1970 (18 U.S.C. § 3503) is based upon earlier efforts of the Advisory Committee on Criminal Rules which has over the past twenty-five years submitted several proposals authorizing government depositions.

The earlier drafts of the Federal Rules of Criminal Procedure proposed that the government be allowed to take depositions. Orfield, The Federal Rules of Criminal Procedure, 33 Calif.L.Rev. 543, 559 (1945). The Fifth Draft of what became rule 15 (then rule 20) dated June 1942, was submitted to the Supreme Court for comment. The court had a number of unfavorable comments about allowing government depositions. These comments were not published. The only reference to the fact that the court made comments is in 2 Orfield, Criminal Procedure under the Federal Rules § 15:1 (1966); and Orfield, Depositions in Federal Criminal Procedure, 9 S.C.L.Q. 376, 380–381 (1957).

The Advisory Committee, in the 1940's, continued to recommend the adoption of a provision authorizing government depositions. The final draft submitted to the Supreme Court contained a section providing:

The following additional requirements shall apply if the deposition is taken at the instance of the government or of a witness. The officer having custody of a defendant shall be notified of the time and place set for examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination. The government shall pay in advance to the defendant's attorney and a defendant not in custody expenses of travel and subsistence for attendance at the examination.

See 2 Orfield, Criminal Procedure under the Federal Rules § 15:3, pp. 447–448 (1966); Orfield, Depositions in Federal Criminal Procedure, 9 S.C.L.Q. 376, 383 (1957).

The Supreme Court rejected this section in this entirety, thus eliminating the provision for depositions by the government. These changes were made without comment.

The proposal to allow government depositions was renewed in the amendments to the Federal Rules of Criminal Procedure in the early 1960's. The Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (December 1962) proposed to amend rule 15 by eliminating the words "of a defendant" from the first sentence of subdivision (a) and adding a subdivision (g) which was practically identical to the subdivision rejected by the Supreme Court in the original draft of the rules.

The Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (March 1964) continued to propose allowing governments depositions. Subdivision (g) was substantially modified, however.

The following additional requirements shall apply if the deposition is taken at the instance of the government or a witness. Both the defendant and his attorney shall be given reasonable advance notice of the time and place set for the examination. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination but his failure to appear after notice and tender of expenses shall constitute a waiver of that right. The government shall pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination. The government shall make available to the defendant for his examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and which the government would be required to make available to the defendant if the witness were testifying at the trial.

The proposal to authorize government depositions was rejected by the Standing Committee on Rules of Practice and Procedure, C. Wright, Federal Practice and Procedure § 241 at 477 (1969). 4 Barron, Federal Practice and Procedure (Supp. 1967). The Report of the Judicial Conference, submitted to the Supreme Court for approval late in 1965, contained no proposal for an amendment to rule 15. See 39 F.R.D. 69, 168–211 (1966).

When the Organized Crime Control Act of 1970 was originally introduced in the Senate (S. 30) it contained a government deposition provision which was similar to the 1964 proposal of the Criminal Rules Advisory Committee, except that the original bill (S. 30) failed to provide standards to control the use of depositions at the trial. For an explanation and defense of the original proposal see McClellan, The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Lawyer 55, 100–108 (1970). This omission was remedied, prior to passage, with the addition of what is now 18 U.S.C. § 3503(f) which prescribes the circumstances in which a deposition can be used. The standards are the same as those in former rule 15(e) with the addition of language allowing the use of the deposition when "the witness refuses in the trial or hearing to testify concerning the subject of the deposition or the part offered."

Before the Organized Crime Control Act of 1970 was enacted an additional amendment was added providing that the right of the government to take a deposition is limited to cases in which the Attorney General certifies that the defendant is "believed to have participated in an organized criminal activity" [18 U.S.C. § 3503(a)]. The argument in favor of the amendment was that the whole purpose of the act was to deal with organized crime and therefore its provisions, including that providing for government depositions, should be limited to organized crime type cases.

There is another aspect of Advisory Committee history which is relevant. In January 1970, the Advisory Committee circulated proposed changes in rule 16, one of which gives the government, when it has disclosed the identity of its witnesses, the right to take a deposition and use it "in the event the witness has become unavailable without the fault of the government or if the witness has changed his testimony." [See Preliminary Draft of Proposed Amendents to the Federal Rules of Criminal Procedure for the United States District Courts, rule 16(a)(1)(vi) (January 1970).] This provision is now incorporated within rule 16(a)(1)(v).

Because neither the court nor the standing committee gave reasons for rejecting the government deposition proposal, it is not possible to know why they were not approved. To the extent that the rejection was based upon doubts as to the constitutionality of such a proposal, those doubts now seem resolved by California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

On the merits, the proposal to allow the government to take depositions is consistent with the revision of rule 16 and with section 804(b)(1) of the Rules of Evidence for the United States Courts and Magistrates (November 1971) which provides that the following is not excluded by the hearsay rule if the declarant is unavailable:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

Subdivision (a) is revised to provide that the government as well as the defendant is entitled to take a deposition. The phrase "whenever due to special circumstances of the case it is in the interest of justice," is intended to make clear that the decision by the court as to whether to order the taking of a deposition shall be made in the context of the circumstances of the particular case. The principal objective is the preservation of evidence for use at trial. It is not to provide a method of pretrial discovery nor primarily for the purpose of obtaining a basis for later cross-examintaion of an adverse witness. Discovery is a mattter dealt with in rule 16. An obviously important factor is whether a deposition will expedite, rather than delay, the administration of criminal justice. Also important is the presence or absence of factors which determine the use of a deposition at the trial, such as the agreement of the parties to use of the deposition; the possible unavailability of the witness; or the possibility that coercion may be used upon the witness to induce him to change his testimony or not to testify. See rule 16(a)(1)(v).

Subdivision (a) also makes explicit that only the "testimony of a prospective witness of a party" can be taken. This means the party's own witness and does not authorize a discovery deposition of an adverse witness. The language "for use at trial" is intended to give further emphasis to the importance of the criteria for use specified in subdivision (e).

In subdivision (b) reference is made to the defendant in custody. If he is in state custody, a writ of habeas corpus ad testificandum (to produce the prisoner for purposes of testimony) may be required to accomplish his presence.

In subdivision (d) the language "except as otherwise provided in these rules" is meant to make clear that the subpoena provisions of rule 17 control rather than the provisions of the civil rules.

The use of the phrase "and manner" in subdivision (d)(2) is intended to emphasize that the authorization is not to conduct an adverse examination of an opposing witness.

In subdivision (e) the phrase "as substantive evidence" is added to make clear that the deposition can be used as evidence in chief as well as for purposes of impeachment.

Subdivision (e) also makes clear that the deposition can be used as affirmative evidence whenever the witness is available but gives testimony inconsistent with that given in the deposition. A California statute which contained a similar provision was held constitutional in California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). This is also consistent with section 801(d)(1) of the Rules of Evidence for United States Courts and Magistrates (Nov. 1971).

Subdivision (f) is intended to insure that a record of objections and the grounds for the objections is made at the time the deposition is taken when the witness is available so that the witness can be examined further, if necessary, on the point of the objection so that there will be an adequate record for the court's later ruling upon the objection.

Subdivision (g) uses the "unavailability" definition of the Rules of Evidence for the United States Courts and Magistrates, 804(a) (Nov. 1971).

Subdivision (h) is intended to make clear that the court always has authority to order the taking of a deposition, or to allow the use of a deposition, where there is an agreement of the parties to the taking or to the use.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247

A. Amendments Proposed by the Supreme Court. Rule 15 of the Federal Rules of Criminal Procedure provides for the taking of depositions. The present rule permits only the defendant to move that a deposition of a prospective witness be taken. The court may grant the motion if it appears that (a) the prospective witness will be unable to attend or be prevented from attending the trial, (b) the prospective witness' testimony is material, and (c) the prospective witness' testimony is necessary to prevent a failure of justice.

The Supreme Court promulgated several amendments to Rule 15. The more significant amendments are described below.

Subdivision (a) as proposed to be amended permits either party to move the court for the taking of a deposition of a witness. However, a party may only move to take the deposition of one of its own witnesses, not one of the adversary party's witnesses.

Subdivision (c) as proposed to be amended provides that whenever a deposition is taken at the instance of the government or of an indigent defendant, the expenses of the taking of the deposition must be paid by the government.

Subdivision (e) as proposed to be amended provides that part or all of the deposition may be used at trial as substantive evidence if the witness if "unavailable" or if the witness gives testimony inconsistent with his deposition.

Subdivision (b)[1] as proposed to be amended defines "unavailable." "Unavailable" as a witness includes situations in which the deponent:

[1] So in original. Probably should be "(g)".

(1) is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his deposition; or

(2) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so; or

(3) testifies to a lack of memory of the subject matter of his deposition; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his deposition has been unable to procure his attendance by process or other reasonable means. A deponent is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his deposition for the purpose of preventing the witness from attending or testifying.

B. Committee Action. The Committee narrowed the definition of "unavailability" in subdivision (g). The Committee deleted language from that subdivision that provided that a witness was "unavailable" if the court exempts him from testifying at the trial on the ground of privilege. The Committee does not want to encourage the use of depositions at trial, especially in view of the importance of having live testimony from a witness on the witness stand.

The Committee added a provision to subdivision (b) to parallel the provision of Rule 43(b)(2). This is to make it clear that a disruptive defendant may be removed from the place where a deposition is being taken.

The Committee added language to subdivision (c) to make clear that the government must pay for the cost of the transcript of a deposition when the deposition is taken at the instance of an indigent defendant or of the government. In order to use a deposition at trial, it must be transcribed. The proposed rule did not explicitly provide for payment of the cost of transcribing, and the Committee change rectifies this.

The Committee notes that subdivision (e) permits the use of a deposition when the witness "gives testimony at the trial or hearing inconsistent with his deposition." Since subdivision (e) refers to the rules of evidence, the Committee understands that the Federal Rules of Evidence will govern the admissibility and use of the deposition. The Committee, by adopting subdivision (e) as proposed to be amended by the Supreme Court, intends the Federal Rules of Evidence to govern the admissibility and use of the deposition.

The Committee believes that Rule 15 will not encourage trials by deposition. A deposition may be taken only in "exceptional circumstances" when "it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved. * * *" A deposition, once it is taken, is not automatically admissible at trial, however. It may only be used at trial if the witness is unavailable, and the rule narrowly defines unavailability. The procedure established in Rule 15 is similar to the procedure established by the Organized Crime Control Act of 1970 for the taking and use of depositions in organized crime cases. See 18 U.S.C. 3503.

CONFERENCE COMMITTEE NOTES, HOUSE REPORT NO. 94-414

Rule 15 deals with the taking of depositions and the use of depositions at trial. Rule 15(e) permits a deposition to be used if the witness is unavailable. Rule 15(g) defines that term.

The Supreme Court's proposal defines five circumstances in which the witness will be considered unavailable. The House version of the bill deletes a provision that said a witness is unavailable if he is exempted at trial, on the ground of privilege, from testifying about the subject-matter of his deposition. The Senate version of the bill by cross reference to the Federal Rules of Evidence, restores the Supreme Court proposal.

The Conference adopts the Senate provision.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APR. 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94-64, effective Dec. 1, 1975, see section 2 of Pub. L. 94-64, set out as a note under Rule 4 of these rules.

RULE 16. DISCOVERY AND INSPECTION

(a) Disclosure of Evidence by the Government.

(1) *Information Subject to Disclosure.*

(A) *Statement of Defendant.* Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(B) *Defendant's Prior Record.* Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) *Documents and Tangible Objects.* Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) *Reports of Examinations and Tests.* Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to

the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) *Grand Jury Transcripts.* Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(4) Repealed. Pub. L. 94–149, § 5, Dec. 12, 1975, 89 Stat. 806.

(b) Disclosure of Evidence by the Defendant.

(1) *Information Subject to Disclosure.*

(A) *Documents and Tangible Objects.* If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) *Reports of Examinations and Tests.* If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(2) *Information Not Subject to Disclosure.* Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(3) Repealed. Pub. L. 94–149, § 5, Dec. 12, 1975, 89 Stat. 806.

(c) Continuing Duty to Disclose.

If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) *Protective and Modifying Orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) *Failure to Comply With a Request.* If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses.

Discovery of alibi witnesses is governed by Rule 12.1. (As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94–64, § 3(20)–(28), 89 Stat. 374, 375; Pub. L. 94–149, § 5, Dec. 12, 1975, 89 Stat. 806.)

NOTES OF ADVISORY COMMITTEE ON RULES

1974 AMENDMENT

Rule 16 is revised to give greater discovery to both the prosecution and the defense. Subdivision (a) deals with disclosure of evidence by the government. Subdivision (b) deals with disclosure of evidence by the defendant. The majority of the Advisory Committee is of the view that the two—prosecution and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution.

The draft provides for a right of prosecution discovery independent of any prior request for discovery by the defendant. The Advisory Committee is of the view that this is the most desirable approach to prosecution discovery. See American Bar Association, Standards Relating to Discovery and Procedure Before Trial, pp. 7, 43–46 (Approved Draft, 1970).

The language of the rule is recast from "the court may order" or "the court shall order" to "the government shall permit" or "the defendant shall permit." This is to make clear that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is dispute as to whether the matter is discoverable or a request for a protective order under subdivision (d)(1). The court, however, has the inherent right to enter an order under this rule.

The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases. For example, subdivision (a)(3) is not intended to deny a judge's discretion to order disclosure of grand jury minutes where circumstances make it appropriate to do so.

Subdivision (a)(1)(A) amends the old rule to provide, upon request of the defendant, the government shall permit discovery if the conditions specified in subdivision

(a)(1)(A) exist. Some courts have construed the current language as giving the court discretion as to whether to grant discovery of defendant's statements. See United States v. Kaminsky, 275 F.Supp. 365 (S.D.N.Y. 1967), denying discovery because the defendant did not demonstrate that his request for discovery was warranted; United States v. Diliberto, 264 F.Supp. 181 (S.D.N.Y. 1967), holding that there must be a showing of actual need before discovery would be granted; United States v. Louis Carreau, Inc., 42 F.R.D. 408 (S.D.N.Y. 1967), holding that in the absence of a showing of good cause the government cannot be required to disclose defendant's prior statements in advance of trial. In United States v. Louis Carreau, Inc. at p. 412, the court stated that if rule 16 meant that production of the statements was mandatory, the word "shall" would have been used instead of "may." See also United States v. Wallace, 272 F.Supp. 838 (S.D.N.Y. 1967); United States v. Wood, 270 F. Supp. 963 (S.D.N.Y. 1967); United States v. Leighton, 265 F.Supp. 27 (S.D.N.Y. 1967); United States v. Longarzo, 43 F. R.D. 395 (S.D.N.Y. 1967); Loux v. United States, 389 F.2d 911 (9th Cir. 1968); and the discussion of discovery in Discovery in Criminal Cases, 44 F.R.D. 481 (1968). Other courts have held that even though the current rules make discovery discretionary, the defendant need not show cause when he seeks to discover his own statements. See United States v. Aadal, 280 F.Supp. 859 (S.D.N.Y. 1967); United States v. Federmann, 41 F.R.D. 339 (S.D.N.Y. 1967); and United States v. Projansky, 44 F.R.D. 550 (S.D.N.Y. 1968).

The amendment making disclosure mandatory under the circumstances prescribed in subdivision (a)(1)(A) resolves such ambiguity as may currently exist, in the direction of more liberal discovery. See C. Wright, Federal Practice and Procedure: Criminal § 253 (1969, Supp. 1971), Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo.L.J. 1276 (1966); Fla.Stat.Ann. § 925.05 (Supp. 1971–1972); N.J.Crim.Prac. Rule 35–11(a) (1967). This is done in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence. This is the ground upon which the American Bar Association Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) has unanimously recommended broader discovery. The United States Supreme Court has said that the pretrial disclosure of a defendant's statements "may be the 'better practice.'" Cicenia v. La Gay, 357 U.S. 504, 511, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958). See also Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L. Ed. 1302 (1952); State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958).

The requirement that the statement be disclosed prior to trial, rather than waiting until the trial, also contributes to efficiency of administration. It is during the pretrial stage that the defendant usually decides whether to plead guilty. See United States v. Projansky, supra. The pretrial stage is also the time during which many objections to the admissibility of types of evidence ought to be made. Pretrial disclosure ought, therefore, to contribute both to an informed guilty plea practice and to a pretrial resolution of admissibility questions. See ABA, Standards Relating to Discovery and Procedure Before Trial § 1.2 and Commentary pp. 40–43 (Approved Draft, 1970).

The American Bar Association Standards mandate the prosecutor to make the required disclosure even though not requested to do so by the defendant. The proposed draft requires the defendant to request discovery, although obviously the attorney for the government may disclose without waiting for a request, and there are situations in which due process will require the prosecution, on its own, to disclose evidence "helpful" to the defense. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L. Ed.2d 737 (1967).

The requirement in subdivision (a)(1)(A) is that the government produce "statements" without further discussion of what "statement" includes. There has been some recent controversy over what "statements" are subject to discovery under the current rule. See Discovery in Criminal Cases, 44 F.R.D. 481 (1968); C. Wright, Federal Practice and Procedure: Criminal § 253, pp. 505–506 (1969, Supp. 1971). The kinds of "statements" which have been held to be within the rule include "substantially verbatim and contemporaneous" statements, United States v. Elife, 43 F.R.D. 23 (S.D.N.Y.1967); statements which reproduce the defendant's "exact words," United States v. Armantrout, 278 F.Supp. 517 (S.D.N.Y. 1968); a memorandum which was not verbatim but included the substance of the defendant's testimony, United States v. Scharf, 267 F.Supp. 19 (S.D.N.Y. 1967); Summaries of the defendant's statements, United States v. Morrison, 43 F.R.D. 516 (N.D.Ill.1967); and statements discovered by means of electronic surveillance, United States v. Black, 282 F.Supp. 35 (D.D.C. 1968). The court in United States v. Iovinelli, 276 F.Supp. 629, 631 (N.D.Ill.1967), declared that "statements" as used in old rule 16 is not restricted to the "substantially verbatim recital of an oral statement" or to statements which are a "recital of past occurrences."

The Jencks Act, 18 U.S.C. § 3500, defines "statements" of government witnesses discoverable for purposes of cross-examination as: (1) a "written statement" signed or otherwise approved by a witness, (2) "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. § 3500(e). The language of the Jencks Act has most often led to a restrictive definition of "statements," confining "statements" to the defendant's "own words." See Hanks v. United States, 388 F.2d 171 (10th Cir. 1968), and Augenblick v. United States, 377 F.2d 586, 180 Ct.Cl. 131 (1967).

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) do not attempt to define "statements" because of a disagreement among members of the committee as to what the definition should be. The majority rejected the restrictive definition of "statements" contained in the Jencks Act, 18 U.S.C. § 3500(e), in the view that the defendant ought to be able to see his statement in whatever form it may have been preserved in fairness to the defendant and to discourage the practice, where it exists, of destroying original notes, after transforming them into secondary transcriptions, in order to avoid cross-examination based upon the original notes. See Campbell v. United States, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963). The minority favored a restrictive definition of "statements" in the view that the use of other than "verbatim" statements would subject witnesses to unfair cross-examination. See American Bar Association's Standards Relating to Discovery and Procedure Before Trial pp. 61–64 (Approved Draft, 1970). The draft of subdivision (a)(1)(A) leaves the matter of the meaning of the term unresolved and thus left for development on a case-by-case basis.

Subdivision (a)(1)(A) also provides for mandatory disclosure of a summary of any oral statement made by defendant to a government agent which the attorney for the government intends to use in evidence. The reasons for permitting the defendant to discover his own statements seem obviously to apply to the substance of any oral statement which the government intends to use in evidence at the trial. See American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(ii) (Approved Draft, 1970). Certainly disclosure will facilitate the raising of objections to admissibility prior to trial. There have been several conflicting decisions under the current rules as to whether the government must disclose the substance of oral statements of the defendant which it has in its possession. Cf. United States v. Baker, 262 F.Supp. 657 (D.C.D.C.1966); United States v. Curry, 278 F.Supp. 508 (N.D.Ill.1967); United States v. Morrison, 43 F.R.D. 516 (ND.Ill.1967); United States v. Reid, 43 F.R.D. 520 (ND.Ill.1967); United States v. Armantrout, 278 F.Supp. 517 (S.D.N.Y.1968); and United States v. Elife, 43 F.R.D. 23 (S.D.N.Y.1967). There is, however, considerable support for the policy of disclosing the substance of the defendant's oral statement. Many courts have indicated that this is a "better practice" than denying such disclosure. E.g., United States v. Curry, supra; Loux v. United States, 389 F.2d 911 (9th Cir. 1968); and United States v. Baker, supra.

Subdivision (a)(1)(A) also provides for mandatory disclosure of any "recorded testimony" which defendant gives before a grand jury if the testimony "relates to the offense charged." The present rule is discretionary and is applicable only to those of defendant's statements which are "relevant."

The traditional rationale behind grand jury secrecy—protection of witnesses—does not apply when the accused seeks discovery of his own testimony. Cf. Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966); and Allen v. United States, 129 U.S.App.D.C. 61, 390 F.2d 476 (1968). In interpreting the rule many judges have granted defendant discovery without a showing of need or relevance. United States v. Gleason, 259 F. Supp. 282 (S.D.N.Y.1966); United States v. Longarzo, 43 F.R.D. 395 (S.D.N.Y.1967); and United States v. United Concrete Pipe Corp, 41 F.R.D. 538 (N.D.Tex. 1966). Making disclosure mandatory without a showing of relevance conforms to the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(iii) and Commentary pp. 64–66 (Approved Draft, 1970). Also see Note, Discovery by a Criminal Defendant of His Own Grand-Jury Testimony, 68 Columbia L.Rev. 311 (1968).

In a situation involving a corporate defendant, statements made by present and former officers and employees relating to their employment have been held discoverable as statements of the defendant. United States v. Hughes, 413 F.2d 1244 (5th Cir. 1969). The rule makes clear that such statements are discoverable if the officer or employe was "able legally to bind the defendant in respect to the activities involved in the charges."

Subdivision (a)(1)(B) allows discovery of the defendant's prior criminal record. A defendant may be uncertain of the precise nature of his prior record and it seems therefore in the interest of efficient and fair administration to make it possible to resolve prior to trial any disputes as to the correctness of the relevant criminal record of the defendant.

Subdivision (a)(1)(C) gives a right of discovery of certain tangible objects under the specified circumstances. Courts have construed the old rule as making disclosure discretionary with the judge. Cf. United States v. Kaminsky, 275 F. Supp. 365 (S.D.N.Y.1967); Gevinson v. United States, 358 F.2d 761 (5th Cir. 1966), cert. denied, 385 U.S. 823, 87 S.Ct. 51, 17 L.Ed.2d 60 (1966); and United States v. Tanner, 279 F.Supp. 457 (N.D.Ill.1967). The old rule requires a "showing of materiality to the preparation of his defense and that the request is reasonable." The new rule requires disclosure if any one of three situations exists: (a) the defendant shows that disclosure of the document or tangible object is material to the defense, (b) the government intends to use the document or tangible object in its presentation of its case in chief, or (c) the documnt or tangible object was obtained from or belongs to the defendant.

Disclosure of documents and tangible objects which are "material" to the preparation of the defense may be required under the rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), without an additional showing that the request is "reasonable." In Brady the court held that "due process" requires that the prosecution disclose evidence favorable to the accused. Although the Advisory Committee decided not to codify the Brady Rule, the requirement that the government disclose documents and tangible objects "material to the preparation of his defense" underscores the importance of disclosure of evidence favorable to the defendant.

Limiting the rule to situations in which the defendant can show that the evidence is material seems unwise. It may be difficult for a defendant to make this showing if he does not know what the evidence is. For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant. See ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(v) and Commentary pp. 68–69 (Approved Draft, 1970). This is probably the result under old rule 16 since the fact that the government intends to use the physical evidence at the trial is probably sufficient proof of "materiality." C. Wright, Federal Practice and Procedure: Criminal § 254 especially n. 70 at p. 513 (1969, Supp.1971). But it seems desirable to make this explicit in the rule itself.

Requiring disclosure of documents and tangible objects which "were obtained from or belong to the defendant" probably is also making explicit in the rule what would otherwise be the interpretation of "materiality." See C. Wright, Federal Practice and Procedure: Criminal § 254 at p. 510 especially n. 58 (1969, Supp. 1971).

Subdivision (a)(1)(C) is also amended to add the word "photographs" to the objects previously listed. See ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(v) (Approved Draft, 1970).

Subdivision (a)(1)(D) makes disclosure of the reports of examinations and tests mandatory. This is the recommendation of the ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(iv) and Commentary pp. 66–68 (Approved Draft, 1970). The obligation of disclosure applies only to scientific tests or experiments "made in connection with the particular case." So limited, mandatory disclosure seems justified because: (1) it is difficult to test expert testimony at trial without advance notice and preparation; (2) it is not likely that such evidence will be distorted or misused if disclosed prior to trial; and (3) to the extent that a test may be favorable to the defense, its disclosure is mandaded under the rule of Brady v. Maryland, supra.

Subdivision (a)(1)(E) is new. It provides for discovery of the names of witnesses to be called by the government and of the prior criminal record of these witnesses. Many states have statutes or rules which require that the accused be notified prior to trial of the witnesses to be called against him. See, e.g., Alaska R.Crim.Proc. 7(c); Ariz.R.Crim.Proc. 153, 17 A.R.S. (1956); Ark.Stat.Ann. § 43–1001 (1947); Cal.Pen.Code § 995n (West 1957); Colo.Rev.Stat.Ann. §§ 39–3–6, 39–4–2 (1963); Fla.Stat.Ann. § 906.29 (1944); Idaho Code Ann. § 19–1404 (1948); Ill.Rev.Stat. ch. 38, § 114–9 (1970); Ind.Ann.Stat. § 9–903 (1956), IC 1971, 35–1–16–3; Iowa Code Ann. § 772.3 (1950); Kan.Stat.Ann. § 62–931 (1964); Ky.R.Crim. Proc. 6.08 (1962); Mich.Stat.Ann. § 28.980, M.C.L.A. § 767.40 (Supp.1971); Minn.Stat.Ann. § 628.08 (1947); Mo.Ann.Stat. § 545.070 (1953); Mont.Rev.Codes Ann. § 95–1503 (Supp.1969); Neb.Rev.Stat. § 29–1602 (1964); Nev.Rev.Stat. § 173.045 (1967); Okl.Stat. tet. 22, § 384 (1951); Ore.Rev.Stat. § 132.580 (1969); Tenn. Code Ann. § 40–1708 (1955); Utah Code Ann. § 77–20–3 (1953). For examples of the ways in which these requirements are implemented, see State v. Mitchell, 181 Kan. 193, 310 P.2d 1063 (1957); State v. Parr, 129 Mont. 175, 283 P.2d 1086 (1955); Phillips v. State. 157 Neb. 419, 59 N.W. 598 (1953).

Witnesses' prior statements must be made available to defense counsel after the witness testifies on direct examination for possible impeachment purposes during trial; 18 U.S.C. § 3500.

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(i) (Approved Draft, 1970) require disclosure of both the names and the statements of prosecution witnesses. Subdivision (a)(1)(E) requires only disclosure, prior to trial, of names, addresses, and prior criminal record. It does not require disclosure of the witnesses' statements although the rule does not preclude the parties from agreeing to disclose statements prior to trial. This is done, for example, in courts using the so-called "omnibus hearing."

Disclosure of the prior criminal record of witnesses places the defense in the same position as the government, which normally has knowledge of the defendant's record and the record of anticipated defense witnesses. In addition, the defendant often lacks means of procuring this information on his own. See American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(vi) (Approved Draft, 1970).

A principal argument against disclosure of the identity of witnesses prior to trial has been the danger to the witness, his being subjected either to physical harm or to threats designed to make the witness unavailable or to influence him to change his testimony. Discovery in Criminal cases, 44 F.R.D. 481, 499–500 (1968); Ratnoff, The New Criminal Deposition Statute in Ohio—Help or Hindrance to Justice?, 19 Case Western Reserve L.Rev. 279, 284 (1968). See, e.g., United States v. Estep, 151 F.Supp. 668, 672–673 (N.D. Tex. 1957):

> Ninety percent of the convictions had in the trial court for sale and dissemination of narcotic drugs are linked to the work and the evidence obtained by an informer. If that informer is not to have his life protected there won't be many informers hereafter.

See also the dissenting opinion of Mr. Justice Clark in Roviaro v. United tSates, 353 U.S. 53, 66–67, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957). Threats of market retaliation against witnesses in criminal antitrust cases are another illustration. Bergen Drug Co. v. Parke, Davis & Company, 307 F.2d 725 (3d Cir. 1962); and House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962). The government has two alternatives when it believes disclosure will create an undue risk of harm to the witness: It can ask for a protective order under subdivision (d)(1). See ABA Standards Relating to Discovery and Procedure Before Trial § 2.5(b) (Approved Draft, 1970). It can also move the court to allow the perpetuation of a particular witness's testimony for use at trial if the witness is unavailable or later changes his testimony. The purpose of the latter alternative is to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury. See rule 15.

Subdivision (a)(2) is substantially unchanged. It limits the discovery otherwise allowed by providing that the government need not disclose "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case" or "statements made by government witnesses or prospective government witnesses." The only proposed change is that the "reports, memoranda, or other internal government documents made by the attorney for the government" are included to make clear that the work product of the government attorney is protected. See C. Wright, Federal Practice and Procedure: Criminal § 254 n. 92 (1969, Supp. 1971); United States v. Rothman, 179 F.Supp. 935 (W.D.Pa. 1959); Note, "Work Product" in Criminal Discovery, 1966 Wash. U.L.Q. 321; American Bar Association, Standards Relating to Discovery and Procedure Before Trial § 2.6(a) (Approved Draft, 1970); cf. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed2d 215 (1963), requires the disclosure of evidence favorable to the defendant. This is, of course, not changed by this rule.

Subdivision (a)(3) is included to make clear that recorded proceedings of a grand jury are explicitly dealt with in rule 6 and subdivision (a)(1)(A) of rule 16 and thus are not covered by other provisions such as subdivision (a)(1)(C) which deals generally with discovery of documents in the possession, custody, or control of the government.

Subdivisions (a)(4) is designed to insure that the government will not be penalized if it makes a full disclosure of all potential witnesses and then decides not to call one or more of the witnesses listed. This is not, however, intended to abrogate the defendant's right to comment generally upon the government's failure to call witnesses in an appropriate case.

Subdivision (b) deals with the government's right to discovery of defense evidence or, put in other terms, with the extent to which a defendant is required to disclose its evidence to the prosecution prior to trial. Subdivision (b) replaces old subdivision (c).

Subdivision (b) enlarges the right of government discovery in severay ways: (1) it gives the government the right to discovery of lists of defense witnesses as well as physical evidence and the results of examinations and tests; (2) it requires disclosure if the defendant has the evidence under his control and intends to use it at trial in his case in chief, without the additional burden, required by the old rule, of having to show, in behalf of the government, that the evidence is material and the request reasonable; and (3) it gives the government the right to discovery without conditioning that right upon the existence of a prior request for discovery by the defendant.

Although the government normally has resources adequate to secure much of the evidence for trial, there are situations in which pretrial disclosure of evidence to the government is in the interest of effective and fair criminal justice administration. For example, the experimental "omnibus hearing" procedure (see discussion in Advisory Committee Note to rule 12) is based upon an assumption that the defendant, as well as the government, will be willing to disclose evidence prior to trial.

Having reached the conclusion that it is desirable to require broader disclosure by the defendant under certain cricumstances, the Advisory Committee has taken the view that it is preferable to give the right of discovery to the government independently of a prior request for discovery by the defendant. This is the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial, Commentary, pp. 43–46 (Approved Draft, 1970). It is sometimes asserted that making the government's right to discovery conditional will minimize the risk that government discovery will be viewed as an infringement of the defendant's constitutional rights. See discussion in C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp.1971); Moore, Criminal Discovery, 19 Hastings L.J. 865 (1968); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am.Cr.L.Q. 3 (1967). There are assertions that prosecution discovery, even if conditioned upon the defendants being granted discovery, is a violation of the privilege. See statements of Mr. Justice Black and Mr. Justice Douglas, 39 F.R.D. 69, 272, 277–278 19 (1966); C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp.1971). Several states require defense disclosure of an intended defense of alibi and, in some cases, a list of witnesses in support of an alibi defense, without making the requirement conditional upon prior discovery being given to the defense. E.g., Ariz.R.Crim.P. 162(B), 17 A.R.S. (1956); Ind.Ann.Stat. § 9–1631 to 9–1633 (1956), IC 1971, 35–5–1–1 to 35–5–1–3; Mich.Comp. Laws Ann. §§ 768.20, 768.21 (1968); N.Y. CPL § 250.20 (McKinney's Consol.Laws, c. 11–A, 1971); and Ohio Rev.Code Ann. § 2945.58 (1954). State courts have refused to hold these statutes violative of the privilege against self-incrimination. See State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931), and People v. Rakiec, 260 App.Div. 452, 23 N.Y.S.2d 607, aff'd, 289 N.Y. 306, 45 N.E.2d 812 (1942). See also rule 12.1 and Advisory Committee Note thereto.

Some state courts have held that a defendant may be required to disclose, in advance of trial, evidence which he intends to use on his own behalf at trial without violating the privilege against self-incrimination. See Jones v. Superior Court of Nevada County, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); People v. Lopez, 60 Cal.2d 223, 32 Cal.Iptr. 424, 384 P.2d 16 (1963); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery?, 51 Calif.L.Rev. 135 (1963); Note, 76 Harv.L.Rev. 838 (1963). The courts in Jones v. Superior Court of Nevada County, supra, suggests that if mandatory disclosure applies only to those items which the accused intends to introduce in evidence at trial, neither the incriminatory nor the involuntary aspects of the privilege against self-incrimination are present.

On balance the Advisory Committee is of the view that an independent right of discovery for both the defendant and the government is likely to contribute to both effective and fair administration. See Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif.L.Rev. 89 (1965), for an analysis of the difficulty of weighing the value of broad discovery against the value which inheres in not requiring the defendant to disclose anything which might work to his disadvantage.

Subdivision (b)(1)(A) provides that the defendant shall disclose any documents and tangible objects which he has in his possession, custody, or control and which he intends to introduce in evidence in his case in chief.

Subdivision (b)(1)(B) provides that the defendant shall disclose the results of physical or mental examinations and scientific tests or experiments if (a) they were made in connection with a particular case; (b) the defendant has them under his control; and (c) he intends to offer them in evidence in his case in chief or which were prepared by a defense witness and the results or reports relate to the witness's testimony. In cases where both prosecution and defense have employed experts to conduct tests such as psychiatric examinations, it seems as important for the government to be able to study the results reached by defense experts which are to be called by the defendant as it does for the defendant to study those of government experts. See Schultz, Criminal Discovery by the Prosecution: Frontier Developments and Some Proposals for the Future, 22 N.Y.U.Intra.L.Rev. 268 (1967); American Bar Association, Standards Relating to Discovery and Procedure Before Trial § 3.2 (Supp., Approved Draft, 1970).

Subdivision (b)(1)(C) provides for discovery of a list of witnesses the defendant intends to call in his case in chief. State cases have indicated that disclosure of a list of defense witnesses does not violate the defendant's privilege against self-incrimination. See Jones v. Superior Court of Nevada, County, supra, and People v. Lopez, supra. The defendant has the same option as does the government if it is believed that disclosure of the identity of a witness may subject that witness to harm or a threat of harm. The defendant can ask for a protective order under subdivision (d)(1) or can take a deposition in accordance with the terms of rule 15.

Subdivision (b)(2) is unchanged, appearing as the last sentence of subdivision (c) of old rule 16.

Subdivision (b)(3) provides that the defendant's failure to introduce evidence or call witnesses shall not be admissible in evidence against him. In states which require pretrial disclosure of witnesses' identity, the prosecution is not allowed to comment upon the defendant's failure to call a listed witness. See O'Connor v. State, 31 Wis.2d 684, 143 N.W.2d 489 (1966); People v. Mancini, 6 N.Y.2d 853, 188 N.Y.S.2d 559, 160 N.E.2d 91 (1959); and State v. Cocco, 73 Ohio App. 182, 55 N.E.2d 430 (1943). This is not, however, intended to abrogate the government's right to comment generally upon the defendant's failure to call witnesses in an appropriate case, other than the defendant's failure to testify.

Subdivision (c) is a restatement of part of old rule 16(g).

Subdivision (d)(1) deals with the protective order. Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed. See Will v. United States, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967). The language "by the judge alone" is not meant to be inconsistent with Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). In Alderman the court points out that there may be appropriate occasions for the trial judge to decide questions relating to pretrial disclosure. See Alderman v. United States, 394 U.S. at 182 n. 14, 89 S.Ct. 961.

Subdivision (d)(2) is a restatement of part of old rule 16(g) and (d).

Old subdivision (f) of rule 16 dealing with time of motions is dropped because rule 12(c) provides the judge with authority to set the time for the making of pretrial motions including requests for discovery. Rule 12 also prescribes the consequences which follow from a failure to make a pretrial motion at the time fixed by the court. See rule 12(f).

NOTES OF COMMITTEE ON THE JUDICIARY HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 16 of the Federal Rules of Criminal Procedure regulates discovery by the defendant of evidence in possession of the prosecution, and discovery by the prosecution of evidence in possession of the defendant. The present rule permits the defendant to move the court to discover certain material. The prosecutor's discovery is limited and is reciprocal—that is, if the defendant is granted discovery of certain items, then the prosecution may move for discovery of similar items under the defendant's control.

As proposed to be amended, the rule provides that the parties themselves will accomplish discovery—no motion need be filed and no court order is necessary. The court will intervene only to resolve a dispute as to whether something is discoverable or to issue a protective order.

The proposed rule enlarges the scope of the defendant's discovery to include a copy of his prior criminal record and a list of the names and addresses, plus record of prior felony convictions, of all witnesses the prosecution intends to call during its case-in-chief. It also permits the defendant to discover the substance of any oral statement of his which the prosecution intends to offer at trial, if the statement was given in response to interrogation by any person known by defendant to be a government agent.

Proposed subdivision (a)(2) provides that Rule 16 does not authorize the defendant to discover "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. . . ."

The proposed rule also enlarges the scope of the government's discovery of materials in the custody of the defendant. The government is entitled to a list of the names and addresses of the witnesses the defendant intends to call during his case-in-chief. Proposed subdivision (b)(2) protects the defendant from having to disclose "reports, memoranda, or other internal defense documents . . . made in connection with the investigation or defense of the case. . . ."

Subdivision (d)(1) of the proposed rule permits the court to deny, restrict, or defer discovery by either party, or to make such other order as is appropriate. Upon request, a party may make a showing that such an order is necessary. This showing shall be made to the judge alone if the party so requests. If the court enters an order after such a showing, it must seal the record of the showing and preserve it in the event there is an appeal.

B. Committee Action. The Committee agrees that the parties should, to the maximum possible extent, accomplish discovery themselves. The court should become involved only when it is necessary to resolve a dispute or to issue an order pursuant to subdivision (d).

Perhaps the most controversial amendments to this rule were those dealing with witness lists. Under present law, the government must turn over a witness list *only* in capital cases. [Section 3432 of title 18 of the United States Code provides: A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.] The defendant never needs to turn over a list of his witnesses. The proposed rule requires both the government and the defendant to turn over witness lists in every case, capital or noncapital. Moreover, the lists must be furnished to the adversary party upon that party's request.

The proposed rule was sharply criticized by both prosecutors and defenders. The prosecutors feared that pretrial disclosure of prosecution witnesses would result in harm to witnesses. The defenders argued that a defendant cannot constitutionally be compelled to disclose his witnesses.

The Committee believes that it is desirable to promote greater pretrial discovery. As stated in the Advisory Committee Note,

> broader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence. . . .

The Committee, therefore, endorses the principle that witness lists are discoverable. However, the Committee

has attempted to strike a balance between the narrow provisions of existing law and the broad provisions of the proposed rule.

The Committee rule makes the procedures defendant-triggered. If the defendant asks for and receives a list of prosecution witnesses, then the prosecution may request a list of defense witnesses. The witness lists need not be turned over until 3 days before trial. The court can modify the terms of discovery upon a sufficient showing. Thus, the court can require disclosure of the witness lists earlier than 3 days before trial, or can permit a party not to disclose the identity of a witness before trial.

The Committee provision promotes broader discovery and its attendant values—informed disposition of cases without trial, minimizing the undesirable effect of surprise, and helping insure that the issue of guilt or innocence is accurately determined. At the same time, it avoids the problems suggested by both the prosecutors and the defenders.

The major argument advanced by prosecutors is the risk of danger to their witnesses if their identities are disclosed prior to trial. The Committee recognizes that there may be a risk but believes that the risk is not as great as some fear that it is. Numerous states require the prosecutor to provide the defendant with a list of prosecution witnesses prior to trial. [These States include Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, Oklahoma, Oregon, Tennessee, and Utah. See Advisory Committee Note, House Document 93–292, at 60.] The evidence before the Committee indicates that these states have not experienced unusual problems of witness intimidation. [See the comments of the Standing Committee on Criminal Law and Procedure of the State Bar of California in Hearings II, at 302.]

Some federal jurisdictions have adopted an omnibus pretrial discovery procedure that calls upon the prosecutor to give the defendant its witness lists. One such jurisdiction is the Southern District of California. The evidence before the Committee indicates that there has been no unusual problems with witness intimidation in that district. Charles Sevilla, Chief Trial Attorney for the Federal Defenders of San Diego, Inc., which operates in the Southern District of California, testified as follows:

> The Government in one of its statements to this committee indicated that providing the defense with witness lists will cause coerced witness perjury. This does not happen. We receive Government witness lists as a matter of course in the Southern District, and it's a rare occasion when there is any overture by a defense witness or by a defendant to a Government witness. It simply doesn't happen except on the rarest of occasion. When the Government has that fear it can resort to the protective order. [Hearings II, at 42.]

Mr. Sevilla's observations are corroborated by the views of the U.S. Attorney for the Southern District of California:

> Concerning the modifications to Rule 16, we have followed these procedures informally in this district for a number of years. We were one of the districts selected for the pilot projects of the Omnibus Hearing in 1967 or 1968. We have found that the courts in our district will not require us to disclose names of proposed witnesses when in our judgment to do so would not be advisable. Otherwise we routinely provide defense counsel with full discovery, including names and addresses of witnesses. We have not had any untoward results by following this program, having in mind that the courts will, and have, excused us from discovery where the circumstances warrant. [Hearings I, at 109.]

Much of the prosecutorial criticism of requiring the prosecution to give a list of its witnesses to the defendant reflects an unwillingness to trust judges to exercise sound judgment in the public interest. Prosecutors have stated that they frequently will open their files to defendants in order to induce pleas. [See testimony of Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, in Hearings I, at 150.]

Prosecutors are willing to determine on their own when they can do this without jeopardizing the safety of witnesses. There is no reason why a judicial officer cannot exercise the same discretion in the public interest.

The Committee is convinced that in the usual case there is no serious risk of danger to prosecution witnesses from pretrial disclosure of their identities. In exceptional instances, there may be a risk of danger. The Committee rule, however, is capable of dealing with those exceptional instances while still providing for disclosure of witnesses in the usual case.

The Committee recognizes the force of the constitutional arguments advanced by defenders. Requiring a defendant, upon request, to give to the prosecution material which may be incriminating, certainly raises very serious constitutional problems. The Committee deals with these problems by having the defendant trigger the discovery procedures. Since the defendant has no constitutional right to discover any of the prosecution's evidence (unless it is exculpatory within the meaning of Brady v. Maryland, 373 U.S. 83 (1963)), it is permissible to condition his access to nonexculpatory evidence upon his turning over a list of defense witnesses. Rule 16 currently operates in this manner.

The Committee also changed subdivisions (a)(2) and (b)(2), which set forth "work product" exceptions to the general discovery requirements. The subsections proposed by the Supreme Court are cast in terms of the type of document involved (e. g., report), rather than in terms of the content (e. g., legal theory). The Committee recast these provisions by adopting language from Rule 26(b)(3) of the Federal Rules of Civil Procedure.

The Committee notes that subdivision (a)(1)(C) permits the defendant to discover certain items that "were obtained from or belong to the defendant." The Committee believes that, as indicated in the Advisory Committee Note [House Document 93–292, at 59], items that "were obtained from or belong to the defendant" are items that are material to the preparation of his defense.

The Committee added language to subdivision (a)(1)(B) to conform it to provisions in subdivision (a)(1)(A). The rule as changed by the Committee requires the prosecutor to give the defendant such copy of the defendant's prior criminal record as is within the prosecutor's "possession, custody, or control, the existence of which is known, or by the exercise of due diligence may become known" to the prosecutor. The Committee also made a similar conforming change in subdivision (a)(1)(E), dealing with the criminal records of government witnesses. The prosecutor can ordinarily discharge his obligation under these two subdivisions, (a)(1)(B) and (E), by obtaining a copy of the F.B.I. "rap sheet."

The Committee made an additional change in subdivision (a)(1)(E). The proposed rule required the prosecutor to provide the defendant with a record of the felony convictions of government witnesses. The major purpose for letting the defendant discover information about the record of government witnesses, is to provide him with information concerning the credibility of those witnesses. Rule 609(a) of the Federal Rules of Evidence permits a party to attack the credibility of a witness with convictions other than just felony convictions. The Committee, therefore, changed subdivision (a)(1)(E) to require the prosecutor to turn over a record of all criminal convictions, not just felony convictions.

The Committee changed subdivision (d)(1), which deals with protective orders. Proposed (d)(1) required the court to conduct an ex parte proceeding whenever a party so requested. The Committee changed the mandatory language to permissive language. A Court may, not must, conduct an ex parte proceeding if a party so requests. Thus, if a party requests a protective or modifying order and asks to make its showing ex parte, the court has two separate determinations to make. First, it must determine whether an ex parte proceeding is appropriate, bearing in mind that ex parte proceedings are disfavored and not to be encouraged. [An ex parte proceeding would seem to be appropriate if any adversary proceeding would defeat the purpose of the protective or modifying order. For example, the identity of a witness would be disclosed and the purpose of the protective order is to conceal that witness' identity.] Second, it must determine whether a protective or modifying order shall issue.

CONFERENCE COMMITTEE NOTES, HOUSE REPORT NO. 94–414

Rule 16 deals with pretrial discovery by the defendant and the government. The House and Senate versions of the bill differ on Rule 16 in several respects.

A. Reciprocal vs. Independent Discovery for the Government.—The House version of the bill provides that the government's discovery is reciprocal. If the defendant requires and receives certain items from the government, then the government is entitled to get similar items from the defendant. The Senate version of the bill gives the government an independent right to discover material in the possession of the defendant.

The Conference adopts the House provisions.

B. Rule 16(a)(1)(A).—The House version permits an organization to discover relevant recorded grand jury testimony of any witness who was, at the time of the acts charged or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind it in respect to the activities involved in the charges. The Senate version limits discovery of this material to testimony of a witness who was, at the time of the grand jury proceeding, so situated as an officer or employee as to have been legally to bind the defendant in respect to the activities involved in the charges.

The Conferees share a concern that during investigations, ex-employees and ex-officers of potential corporate defendants are a critical source of information regarding activities of their former corporate employers. It is not unusual that, at the time of their testimony or interview, these persons may have interests which are substantially adverse to or divergent from the putative corporate defendant. It is also not unusual that such individuals, though no longer sharing a community of interest with the corporation, may nevertheless be subject to pressure from their former employers. Such pressure may derive from the fact that the ex-employees or ex-officers have remained in the same industry or related industry, are employed by competitors, suppliers, or customers of their former employers, or have pension or other deferred compensation arrangements with former employers.

The Conferees also recognize that considerations of fairness require that a defendant corporation or other legal entity be entitled to the grand jury testimony of a former officer or employee if that person was personally involved in the conduct constituting the offense and was able legally to bind the defendant in respect to the conduct in which he was involved.

The Conferees decided that, on balance, a defendant organization should not be entitled to the relevant grand jury testimony of a former officer or employee in every instance. However, a defendant organization should be entitled to it if the former officer or employee was personally involved in the alleged conduct constituting the offense and was so situated as to have been able legally to bind the defendant in respect to the alleged conduct. The Conferees note that, even in those situations where the rule provides for disclosure of the testimony, the Government may, upon a sufficient showing, obtain a protective or modifying order pursuant to Rule 16(d)(1).

The Conference adopts a provision that permits a defendant organization to discover relevant grant jury testimony of a witness who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

C. Rules 16(a)(1)(E) and (b)(1)(C) (witness lists).—The House version of the bill provides that each party, the government and the defendant, may discover the names and addresses of the other party's witnesses 3 days before trial. The Senate version of the bill eliminates these provisions, thereby making the names and addresses of a party's witnesses nondiscoverable. The Senate version also makes a conforming change in Rule 16(d)(1). The Conference adopts the Senate version.

A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

D. Rules 16(a)(2) and (b)(2).—Rules 16(a)(2) and (b)(2) define certain types of materials ("work product") not to be discoverable. The House version defines work product to be "the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents." This is parallel to the definition in the Federal Rules of Civil Procedure. The Senate version returns to the Supreme Court's language and defines work product to be "reports, memoranda, or other internal government documents." This is the language of the present rule.

The Conference adopts the Senate provision.

The Conferees note that a party may not avoid a legitimate discovery request merely because something is labelled "report", "memorandum", or "internal document". For example if a document qualifies as a statement of the defendant within the meaning of the Rule 16(a)(1)(A), then the labelling of that document as "report", "memorandum", or "internal government document" will not shield that statement from discovery. Likewise, if the results of an experiment qualify as the results of a scientific test within the meaning of Rule 16(b)(1)(B), then the results of that experiment are not shielded from discovery even if they are labelled "report", "memorandum", or "internal defense document".

1975 AMENDMENT

Subd. (a)(4). Pub. L. 94–149 deleted par. (4) reading "Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness.

Subd. (b)(3). Pub. L. 94–149 deleted par. (3) reading "Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for a comment upon a failure to call a witness."

EFFECTIVE DATE OF AMENDMENTS PROPOSED APR. 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

RULE 17. SUBPOENA

(a) For attendance of witnesses; form; issuance.

A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate in a proceeding before him, but it need not be under the seal of the court.

* * * * *

(f) For Taking Deposition; Place of Examination.

(1) *Issuance.* An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein.

(2) *Place.* The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.

(g) Contempt.

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate. (As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94–64, § 3(29), 89 Stat. 375.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

Subdivisions (a) and (g) are amended to reflect the existence of the "United States magistrate," a phrase defined in rule 54.

1974 AMENDMENT

Subdivision (f)(2) is amended to provide that the court has discretion over the place at which the deposition is to be taken. Similar authority is conferred by Civil Rule 45(d)(2). See C. Wright, Federal Practice and Procedure: Criminal § 278 (1969).

Ordinarily the deposition should be taken at the place most convenient for the witness but, under certain circumstances, the parties may prefer to arrange for the presence of the witness at a place more convenient to counsel.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247

A. Amendments Proposed by the Supreme Court. Rule 17 of the Federal Rules of Criminal Procedure deals with subpoenas. Subdivision (f)(2) as proposed by the Supreme Court provides:

The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court.

B. Committee Action. The Committee added language to the proposed amendment that directs the court to consider the convenience of the witness and the parties when compelling a witness to attend where a deposition will be taken.

SUPERSEDURE

Provision of subd. (d) of this rule that witness shall be tendered the fee for 1 day's attendance and mileage allowed by law as superseded by section 1825 of Title 28, Judiciary and Judicial Procedure, see such section and Reviser's Note thereunder.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APR. 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

V. VENUE

RULE 20. TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE

(a) Indictment or Information Pending.

A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which he was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.

(b) Indictment or Information Not Pending.

A defendant arrested, held, or present in a district other than the district in which a complaint is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which he was arrested, held, or present subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys and upon filing of an information or the return of an indictment, the clerk of the court for the district in which the warrant was issued shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant was arrested, held, or present, and the prosecution shall continue in that district. When the defendant is brought before the court to plead to an information filed in the district where the warrant was issued, he may at that time waive indictment as provided in Rule 7, and the prosecution may continue based upon the information originally filed.

(c) Effect of Not Guilty Plea.

If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that he wishes to plead guilty or nolo contendere shall not be used against him.

(d) Juveniles.

A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which he is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after he has been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which he is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of his rights, including the right to be returned to the district in which he is alleged to have committed the act, and of the consequences of such consent. (As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94–64, § 3(30), 89 Stat. 375.)

NOTES OF ADVISORY COMMITTEE ON RULES

1974 AMENDMENT

Rule 20 is amended to provide that a person "present" in a district other than the district in which he is charged with a criminal offense may, subject to the other provisions of rule 20, plead guilty in the district in which he is "present." See rule 6(b), Rules of Procedure for the Trial of Minor Offenses Before Magistrates.

Under the former rule, practice was to have the district in which the offense occurred issue a bench warrant authorizing the arrest of the defendant in the district in which he was located. This is a procedural complication which serves no interest of either the government

or the defense and therefore can properly be dispensed with.

Making the fact that a defendant is "present" in the district an adequate basis for allowing him to plead guilty there makes it unnecessary to retain subdivision (e) which makes appearance in response to a summons equivalent to an arrest. Dropping (e) will eliminate some minor ambiguity created by that subdivision. See C. Wright, Federal Practice and Procedure: Criminal § 322 n. 26, p. 612 (1969, Supp.1971).

There are practical advantages which will follow from the change. In practice a person may turn himself in in a district other than that in which the prosecution is pending. It may be more convenient to have him plead in the district in which he is present rather than having him or the government incur the expense of his return to the district in which the charge is pending.

The danger of "forum shopping" can be controlled by the requirement that both United States Attorneys agree to the handling of the case under provisions of this rule.

NOTES OF COMMITTEE ON THE JUDICIARY HOUSE REPORT NO. 94–247

A. Amendments Proposed by the Supreme Court. Rule 20 of the Federal Rules of Criminal Procedure deals with transferring a defendant from one district to another for the purpose of pleading and being sentenced. It deals with the situation where a defendant is located in one district (A) and is charged with a crime in another district (B). Under the present rule, if such a defendant desires to waive trial and plead guilty or nolo contendere, a judge in district B would issue a bench warrant for the defendant, authorizing his arrest in district A and his transport to district B for the purpose of pleading and being sentenced.

The Supreme Court amendments permit the defendant in the above example to plead guilty or nolo contendere in district A, if the United States Attorneys for districts A and B consent.

B. Committee Action. The Committee has added a conforming amendment to subdivision (d), which establishes procedures for dealing with defendants who are juveniles.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APR. 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub.L. 94–64, effective Dec. 1, 1975, see section 2 of Pub.L. 94–64, set out as a note under rule 4 of these rules.

VI. TRIAL

RULE 26. TAKING OF TESTIMONY

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. (As amended Nov. 20, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

The first sentence is retained, with appropriate narrowing of the title, since its subject is not covered in the Rules of Evidence. The second sentence is deleted because the Rules of Evidence govern admissibility of evidence, competency of witnesses, and privilege. The language is broadened, however, to take account of the Rules of Evidence and any other rules adopted by the Supreme Court.

EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 3771 of Title 18.

RULE 26.1. DETERMINATION OF FOREIGN LAW

A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law. (As amended Nov. 20, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

Since the purpose is to free the judge, in determining foreign law, from restrictive evidentiary rules, the reference is made to the Rules of Evidence generally.

EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 3771 of Title 18.

RULE 28. INTERPRETERS

The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct. (As amended Nov. 20, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

Subdivision (a). This subdivision is stricken, since the subject of court-appointed expert witnesses is covered in Evidence Rule 706 in detail.

Subdivision (b). The provisions of subdivision (b) are retained. Although Evidence Rule 703 specifies the qualifications of interpreters and the form of oath to be administered to them, it does not cover their appointment or compensation.

EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 3771 of Title 18.

RULE 29.1. CLOSING ARGUMENT

After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal. (Added Apr. 22, 1974, eff. Dec. 1, 1975.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is designed to control the order of closing argument. It reflects the Advisory Committee's view that it is desirable to have a uniform federal practice. The rule is drafted in the view that fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247

A. Amendments Proposed by the Supreme Court, Rule 29.1 is a new rule that was added to regulate closing arguments. It prescribes that the government shall make its closing argument and then the defendant shall make his. After the defendant has argued, the government is entitled to reply in rebuttal.

B. Committee Action. The Committee endorses and adopts this proposed rule in its entirety. The Committee believes that as the Advisory Committee Note has stated, fair and effective administration of justice is best served

if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply. Rule 29.1 does not specifically address itself to what happens if the prosecution waives its initial closing argument. The Committee is of the view that the prosecutor, when he waives his initial closing argument, also waives his rebuttal. [See the remarks of Senior United States Circuit Judge J. Edward Lumbard in Hearings II, at 207.]

EFFECTIVE DATE

This rule effective Dec. 1, 1975, see section 2 of Pub.L. 94–64, set out as a note under rule 4 of these rules.

RULE 31. VERDICT

* * * * *

(e) Criminal forfeiture.

If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any. (As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

Subdivision (e) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408 (a) (2).

The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved. See Advisory Committee Note to rule 7(c) (2).

Although special verdict provisions are rare in criminal cases, they are not unknown. See *United States* v. *Spock*, 416 F. 2d 165 (1st Cir. 1969), especially footnote 41 where authorities are listed.

VII. JUDGMENT

RULE 32. SENTENCE AND JUDGMENT

(a) Sentence.

(1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay. Before imposing sentence, the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.

(2) *Notification of Right to Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment.

(1) *In general.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) *Criminal forfeiture.* When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) Presentence Investigation.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(3) *Disclosure.*

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c) (3) (A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence investigation report made available to the defendant or his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. §§ 4208(b), 4252, 5010(e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

* * * * *

(e) Probation.

After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

* * * * *

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94–64, § 3(31)–(34), 89 Stat. 376.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

Subdivision (b)(2) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provisions of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408(a)(2).

18 U.S.C. § 1963(c) provides for property seizure and disposition. In part it states:

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper.

Although not specifically provided for in the Comprehensive Drug Abuse Prevention and Control Act of 1970, the provision of Title II, § 408(a)(2) forfeiting "profits" or "interest" will need to be implemented procedurally, and therefore new rule 32(b)(2) will be applicable also to that legislation.

For a brief discussion of the procedural implications of a criminal forfeiture, see Advisory Committee Note to rule 7(c)(2).

1974 AMENDMENT

Subdivision (a)(1) is amended by deleting the reference to commitment or release pending sentencing. This issue is dealt with explicitly in the proposed revision of rule 46(c).

Subdivision (a)(2) is amended to make clear that there is no duty on the court to advise the defendant of the right to appeal after sentence is imposed following a plea of guilty or nolo contendere.

To require the court to advise the defendant of a right to appeal after a plea of guilty, accepted pursuant to the increasingly stringent requirements of rule 11, is likely to be confusing to the defendant. See American Bar Association Standards Relating to Criminal Appeals § 2.1(b) (Approved Draft, 1970), limiting the court's duty to advice to "contested cases."

The Advisory Committee is of the opinion that such advice, following a sentence imposed after a plea of guilty, will merely tend to build false hopes and encourage frivolous appeals, with the attendant expense to the defendant or the taxpayers.

Former rule 32(a)(2) imposes a duty only upon conviction after "trial on a plea of not guilty." The few federal cases dealing with the question have interpreted rule 32(a)(2) to say that the court has no duty to advise defendant of his right to appeal after conviction following a guilty plea. Burton v. United States, 307 F.Supp. 448, 450 (D.Ariz.1970); Alaway v. United States, 280 F.Supp. 326, 336 (C.D.Calif.1968); Crow v. United States, 397 F.2d 284, 285 (10th Cir. 1968).

Prior to the 1966 amendment of rule 32, the court's duty was even more limited. At that time [rule 37(a)(2)] the court's duty to advise was limited to those situations in which sentence was imposed after trial upon a not guilty plea of a defendant not represented by counsel. 8A J. Moore, Federal Practice ¶ 32.01[3] (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal § 528 (1969); 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32:11 (1967).

With respect to appeals in forma pauperis, see appellate rule 24.

Subdivision (c)(1) makes clear that a presentence report is required except when the court otherwise directs for reasons stated of record. The requirement of reasons on the record for not having a presentence report is intended to make clear that such a report ought to be routinely required except in cases where there is a reason for not doing so. The presentence report is of great value for correctional purposes and will serve as a valuable aid in reviewing sentences to the extent that sentence review may be authorized by future rule change. For an analysis of the current rule as it relates to the situation in which a presentence investigation is required, see C. Wright, Federal Practice and Procedure: Criminal § 522 (1969); 8A J. Moore, Federal Practice ¶ 32.03[1] (2d ed. Cipes 1969).

Subdivision (c)(1) is also changed to permit the judge, after obtaining defendant's consent, to see the presentence report in order to decide whether to accept a plea agreement, and also to expedite the imposition of sentence in a case in which the defendant has indicated that he may plead guilty or nolo contendere.

Former subdivision (c)(1) provides that "The report shall not be submitted to the court * * * unless the defendant has pleaded guilty * * *." This precludes a judge from seeing a presentence report prior to the acceptance of the plea of guilty. L. Orfield, Criminal Procedure Under the Federal Rules § 32:35 (1967); 8A J. Moore, Federal Practice ¶ 32.03[2], p. 32–22 (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal § 523, p. 392 (1969); Gregg v. United States, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969).

Because many plea agreements will deal with the sentence to be imposed, it will be important, under rule 11, for the judge to have access to sentencing information as a basis for deciding whether the plea agreement is an appropriate one.

It has been suggested that the problem be dealt with by allowing the judge to indicate approval of the plea agreement subject to the condition that the information in the presentence report is consistent with what he has been told about the case by counsel. See American Bar Association, Standards Relating to Pleas of Guilty § 3.3 (Approved Draft, 1968); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 136 (1967).

Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea. See Enker, Perpectives on Plea Bargaining, Appendix A of President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts at 117 (1967). It enables the judge to have all of the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.

There is presently authority to have a presentence report *prepared* prior to the acceptance of the plea of guilty. In Gregg v. United States, 394 U.S. 489, 491, 89 S.Ct. 1134 22 L.Ed.2d 442 (1969), the court said that the "language [of rule 32] clearly permits the preparation of a presentence report before guilty plea or conviction * * *." In footnote 3 the court said:

The history of the rule confirms this interpretation. The first Preliminary Draft of the rule would have required the consent of the defendant or his attorney to commence the investigation before the determination of guilt. Advisory

Committee on Rules of Criminal Procedure, Fed.Rules Crim.Proc., Preliminary Draft 130, 133 (1943). The Second Preliminary Draft omitted this requirement and imposed no limitation on the time when the report could be made and submitted to the court. Advisory Committee on Rules of Criminal Procedure, Fed.Rules Crim.Proc. Second Preliminary Draft 126–128 (1944). The third and final draft, which was adopted as Rule 32, was evidently a compromise between those who opposed any time limitation, and those who preferred that the entire investigation be conducted after determination of guilt. See 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32.2 (1967).

Where the judge rejects the plea agreement after seeing the presentence report, he should be free to recuse himself from later presiding over the trial of the case. This is left to the discretion of the judge. There are instances involving prior convictions where a judge may have seen a presentence report, yet can properly try a case on a plea of not guilty. Webster v. United States, 330 F. Supp. 1080 (D.C., 1971). Unlike the situation in *Greg v. United States*, subdivision (e)(3) provides for disclcsure of the presentence report to the defendant, and this will enable counsel to know whether the information thus made available to the judge is likely to be prejudicial. Presently trial judges who decide pretrial motions to suppress illegally obtained evidence are not, for that reason alone, precluded from presiding at a later trial.

Subdivision (c)(3)(A) requires disclosure of presentence information to the defense, exclusive of any recommendation of sentence. The court is required to disclose the report to defendant or his counsel unless the court is of the opinion that disclosure would seriously interfere with rehabilitation, compromise confidentiality, or create risk of harm to the defendant or others.

Any recommendation as to sentence should not be disclosed as it may impair the effectiveness of the probation officer if the defendant is under supervision on probation or parole.

The issue of disclosure of presentence information to the defense has been the subject of recommendations from the Advisory Committee in 1944, 1962, 1964, and 1966. The history is dealt with in considerable detail in C. Wright, Federal Practice and Procedure: Criminal § 524 (1969), and 8A J. Moore, Federal Practice ¶ 32.03[4] (2d ed. Cipes 1969).

In recent years, three prestigious organizations have recommended that the report be disclosed to the defense. See American Bar Association, Standards Relating to Sentencing Alternatives and Procedures § 4.4 (Approved Draft, 1968); American Law Institute Model Penal Code § 7.07(5) (P.O.D.1962); National Council on Crime and Delinquency, Model Sentencing Act § 4 (1963). This is also the recommendation of the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) at p. 145:

In the absence of compelling reasons for nondisclcsure of special information, the defendant and his counsel should be permitted to examine the entire presentence report.

The arguments for and against disclosure are well known and are effectively set forth in American Bar Association Standards Relating to Sentencing Alternatives and Procedures, § 4.4 Commentary at pp. 214–225 (Approved Draft, 1968). See also Lehrich, The Use and Disclosure of Presentence Reports in the United States, 47 F.R.D. 225 (1969).

A careful account of existing practices in Detroit, Michigan and Milwaukee, Wisconsin is found in R. Dawson, Sentencing (1969).

Most members of the federal judiciary have, in the past, opposed compulsory disclosure. See the view of District Judge Edwin M. Stanley, American Bar Association Standards Relating to Sentencing Alternatives and Procedures. Appendix A. (Appendix A also contains the results of a survey of all federal judges showing that the clear majority opposed disclosure.)

The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise misleading. Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports or the argument that sentencing procedures will become unnecessarily protracted. It is not intended that the probation officer would be subjected to any rigorous examination by defense counsel, or that he will even be sworn to testify. The proceedinigs may be very informal in nature unless the court orders a full hearing.

Subdivision (c)(3)(B) provides for situations in which the sentencing judge believes that disclosure should not be made under the criteria set forth in subdivision (c)(3)(A). He may disclose only a summary of that factual information "to be relied on in determining sentence." This is similar to the proposal of the American Bar Association Standards Relating to Sentencing Alternatives and Procedures § 4.4(b) and Commentary at pp. 216–224.

Subdivision (c)(3)(D) provides for the return of disclosed presentence reports to insure that they do not become available to unauthorized persons. See National Council on Crime and Delinquency, Model Sentencing Act § 4 (1963): "Such reports shall be part of the record but shall be sealed and opened only on order of the court."

Subdivision (c)(3)(E) makes clear that diagnostic studies under 18 U.S.C. §§ 4208(b), 5010(c), or 5034 are covered by this rule and also that 18 U.S.C. § 4252 is included within the disclosure provisions of subdivision (c). Section 4252 provides for the presentence examination of an "eligible offender" who is believed to be an addict to determine whether "he is an addict and is likely to be rehabilitated through treatment."

Both the Organized Crime Control Act of 1970 [§ 3775(b)] and the Comprehensive Drug Abuse Prevention and Control Act of 1970 [§ 409(b)] have special provisions for presentence investigation in the implementation of the dangerous special offender provision. It is however, unnecessary to incorporate them by reference in rule 32 because each contains a specific provision requiring disclosure of the presentence report. The judge does have authority to withhold some information "in extraordinary cases" provided notice is given the parties and the court's reasons for withholding information are made part of the record.

Subdivision (e) is amended to clarify the meaning.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT No. 94–247

A. Amendments Proposed by the Supreme Court Rule 32 of the Federal Rules of Criminal Procedure deals with sentencing matters.

Proposed subdivision (a)(2) provides that the court is not dutybound to advise the defendant of a right to appeal when the sentence is imposed following a plea of guilty or nolo contendere.

Proposed subdivision (e) provides that the probation service must make a presentence investigation and report unless the court orders otherwise "for reasons stated on the record." The presentence report will not be submitted to the court until after the defendant pleads nolo contendere or guilty, or is found guilty, unless the defendant consents in writing. Upon the defendant's request, the court must permit the defendant to read the presentence report, except for the recommendation as to sentence. However, the court may decline to let the defendant read the report if it contains (a) diagnostic opinion that might seriously disrupt a rehabilitation program, (b) sources of information obtained upon a promise of confidentiality, or (c) any other information that, if disclosed, might result in harm to the defendant or other persons. The court must give the defendant an opportunity to comment upon the presentence report. If the court decides that the defendant should not see the report, then it must provide the defendant, orally or in writing, a summary of the factual information in the report upon which it is relying in determining sentence. No party may keep the report or make copies of it.

B. Committee Action. The Committee added language to subdivision (a)(1) to provide that the attorney for the government may speak to the court at the time of sentencing. The language does not require that the

attorney for the government speak but permits him to do so if he wishes.

The Committee recast the language of subdivision (c)(1), which defines when presentence reports must be obtained. The Committee's provision makes it more difficult to dispense with a presentence report. It requires that a presentence report be made unless (a) the defendant waives it, or (b) the court finds that the record contains sufficient information to enable the meaningful exercise of sentencing discretion and explains this finding on the record. The Committee believes that presentence reports are important aids to sentencing and should not be dispensed with easily.

The Committee added language to subdivision (c)(3)(D) that gives the court the discretion to permit either the prosecutor or the defense counsel to retain a copy of the presentence report. There may be situations when it would be appropriate for either or both of the parties to retain the presentence reprt. The Committee believes that the rule should give the court the discretion in such situations to permit the parties to retain their copies.

The Committee added language to subdivision (c)(3)(A) that permits a defendant to offer testimony or information to rebut alleged factual inaccuracies in the presentence report. Since the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect. The Committee's addition to subdiviison (c)(3)(A) will help insure the accuracy of the presentence report.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APR. 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub.L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

VIII. APPEAL

RULE 38. STAY OF EXECUTION, AND RELIEF PENDING REVIEW

(a) Stay of execution.

(1) *Death.* A sentence of death shall be stayed if an appeal is taken.

(2) *Imprisonment.* A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where his appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals.

(3) *Fine.* A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(4) *Probation.* An order placing the defendant on probation may be stayed if an appeal is taken. If not stayed, the court shall specify when the term of probation shall commence. If the order is stayed the court shall fix the terms of the stay.

* * * * *

(As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

Rule 38(a)(2) is amended to reflect rule 9(b), Federal Rules of Appellate Procedure. The criteria for the stay of a sentence of imprisonment pending disposition of an appeal are those specified in rule 9(c) which incorporates 18 U.S.C. § 3148 by reference.

The last sentence of subdivision (a)(2) is retained although easy access to the defendant has become less important with the passage of the Criminal Justice Act which provides for compensation to the attorney to travel to the place at which the defendant is confined. Whether the court will recommend confinement near the place of trial or place where the appeal is to be heard will depend upon a balancing of convenience against the possible advantage of confinement at a more remote correctional institution where facilities and program may be more adequate.

The amendment to subdivision (a)(4) gives the court discretion in deciding whether to stay the order placing the defendant on probation. It also makes mandatory the fixing of conditions for the stay if a stay is granted. The court cannot release the defendant pending appeal without either placing him on probation or fixing the conditions for the stay under the Bail Reform Act, 18 U.S.C. § 3148.

Former rule 38(a)(4) makes mandatory a stay of an order placing the defendant on probation whenever an appeal is noted. The court may or may not impose conditions upon the stay. See rule 46, Federal Rules of Criminal Procedure; and the Bail Reform Act, 18 U.S.C. § 3148.

Having the defendant on probation during the period of appeal may serve the objectives of both community protection and defendant rehabilitation. In current practice, the order of probation is sometimes stayed for an appeal period as long as two years. In a situation where the appeal is unsuccessful, the defendant must start under probation supervision after so long a time that the conditions of probation imposed at the time of initial sentencing may no longer appropriately relate either to the defendant's need for rehabilitation or to the community's need for protection. The purposes of probation are more likely to be served if the judge can exercise discretion, in appropriate cases, to require the defendant to be under probation during the period of appeal. The American Bar Association Project on Standards for Criminal Justice takes the position that prompt imposition of sentence aids in the rehabilitation of defendants, ABA Standards Relating to Pleas of Guilty § 1.8(a)(i), Commentary p. 40 (Approved Draft, 1968). See also Sutherland and Cressey, Principles of Criminology 336 (1966).

Under 18 U.S.C. § 3148 the court now has discretion to impose conditions of release which are necessary to protect the community against danger from the defendant. This is in contrast to release prior to conviction, where the only appropriate criterion is insuring the appearance of the defendant. 18 U.S.C. § 3146. Because the court may impose conditions of release to insure community protection, it seems appropriate to enable the court to do so by ordering the defendant to submit to probation supervision during the period of appeal, thus giving the probation service responsibility for supervision.

A major difference between probation and release under 18 U.S.C. § 3148 exists if the defendant violates the conditions imposed upon his release. In the event that release is under 18 U.S.C. § 3148, the violation of the condition may result in his being placed in custody pending the decision on appeal. If the appeal were unsuccessful, the order placing him on probation presumably would become effective at that time, and he would then be released under probation supervision. If the defendant were placed on probation, his violation of a condition could result in the imposition of a jail or prison sentence. If the

appeal were unsuccessful, the jail or prison sentence would continue to be served.

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Commitment to Another District; Removal

(a) Arrest in nearby district.

If a person is arrested on a warrant issued upon a complaint in a district other than the district of the arrest but in the same state, or on a warrant issued upon a complaint in another state but at a place less than 100 miles from the place of arrest, or without a warrant for an offense committed in another district in the same state or in another state but at a place less than 100 miles from the place of the arrest, he shall be taken without unnecessary delay before the nearest available federal magistrate; preliminary proceedings shall be conducted in accordance with Rules 5 and 5.1; and if held to answer, he shall be held to answer to the district court for the district in which the prosecution is pending, or if the arrest was without a warrant, for the district in which the offense was committed. If such an arrest is made on a warrant issued on an indictment or information, the person arrested shall be taken before the district court in which the prosecution is pending or, for the purpose of admission to bail, before a federal magistrate in the district of the arrest in accordance with provisions of Rule 9(c)(1).

(b) Arrest in distant district.

(1) *Appearance before federal magistrate.* If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state or a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available federal magistrate in the district in which the arrest was made.

(2) *Statement by federal magistrate.* The federal magistrate shall inform the defendant of the rights specified in Rule 5(c), of his right to have a hearing or to waive a hearing by signing a waiver before the federal magistrate, of the provisions of Rule 20, and shall authorize his release under the terms provided for by these rules and by 18 U.S.C. § 3146 and § 3148.

(3) *Hearing; warrant of removal or discharge.* The defendant shall not be called upon to plead. If the defendant waives hearing, a judge of the United States shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the federal magistrate shall hear the evidence. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If a United States magistrate hears the evidence he shall report his findings and recommendations to a judge of the United States. If it appears from the United States magistrate's report or from the evidence adduced before the judge of the United States that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. There is "sufficient grounds" for ordering removal under the following circumstances:

(A) If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment.

(B) If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged.

(C) If a person is arrested without a warrant, the hearing may be continued for a reasonable time, upon a showing of probable cause to believe that he is guilty of the offense charged; but he may not be removed as herein provided unless a warrant issued in the district in which the offense is alleged to have been committed is presented.

(4) *Bail.* If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending under the terms provided for by these rules and by 18 U.S.C. § 3146 and § 3148. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(5) *Authority of United States magistrate.* When authorized by a rule of the district court, adopted in accordance with 28 U.S.C. § 636(b), a United States magistrate may issue a warrant of removal under subdivision (b)(3) of this rule. (As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

Notes of Advisory Committee on Rules

1972 Amendment

Subdivision (a) is amended to make clear that the person shall be taken before the federal magistrate "without unnecessary delay." Although the former rule was silent in this regard, it probably would have been interpreted to require prompt appearance, and there is therefore advantage in making this explicit in the rule itself. See C. Wright, Federal Practice and Procedure: Criminal § 652 (1969, Supp. 1971). Subdivision (a) is amended to also make clear that the person is to be brought before a "federal magistrate" rather than a state or local magistrate authorized by 18 U.S.C. § 3041. The former rules were inconsistent in this regard. Although rule 40(a) provided that the person may be brought before a state or local officer authorized by former rule 5(a), such state or local officer lacks authority to conduct a preliminary examination under rule 5(c), and a principal purpose of the appearance is to hold a preliminary examination where no prior indictment or information has issued. The Federal Magistrates Act should make it possible to bring a person before a federal magistrate. See C. Wright, Federal Practice and Procedure: Criminal § 653, especially n.35 (1969, Supp. 1971).

Subdivision (b)(2) is amended to provided that the federal magistrate should inform the defendant of the fact that he may avail himself of the provisions of rule 20 if applicable in the particular case. However, the failure to so notify the defendant should not invalidate the removal procedure. Although the old rule is silent in this respect, it is current practice to so notify the defendant, and it seems desirable, therefore, to make this explicit in the rule itself.

The requirement that an order of removal under subdivision (b)(3) can be made only by a judge of the

United States and cannot be made by a United States magistrate is retained. However, subdivision (b)(5) authorizes issuance of the warrant of removal by a United States magistrate if he is authorized to do so by a rule of district court adopted in accordance with 28 U.S.C. § 636(b):

Any district court * * * by the concurrence of a majority of all the judges * * * may establish rules pursuant to which any full-time United States magistrate * * * may be assigned * * * such additional duties as are not inconsistent with the Constitution and laws of the United States.

Although former rule 40(b)(3) required that the warrant of removal be issued by a judge of the United States, there appears no constitutional or statutory prohibition against conferring this authority upon a United States magistrate in accordance with 28 U.S.C. § 636(b). The background history is dealt with in detail in 8A J. Moore, Federal Practice ¶¶ 40.01 and 40.02 (2d ed. Cipes 1970, Supp. 1971).

Subdivision (b)(4) makes explicit reference to provisions of the Bail Reform Act of 1966 by incorporating a cross-reference to 18 U.S.C. § 3146 and § 3148.

Rule 41. Search and Seizure

(a) Authority to issue warrant.

A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property which may be seized with a warrant.

A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(c) Issuance and contents.

A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(d) Execution and return with inventory.

The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for return of property.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to suppress.

A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) Return of papers to clerk.

The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) Scope and definition.

This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant. (As amended Apr. 24, 1972, eff. Oct. 1, 1972; Mar. 18 1974, eff. July 1, 1974.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

Subdivision (a) is amended to provide that a search warrant may be issued only upon the request of a federal law enforcement officer or an attorney for the government. The phrase "federal law enforcement officer" is defined in subdivision (h) in a way which will allow the Attorney General to designate the category of officers who are authorized to make application for a search warrant. The phrase "attorney for the government" is defined in rule 54.

The title to subdivision (b) is changed to make it conform more accurately to the content of the subdivision. Subdivision (b) is also changed to modernize the language used to describe the property which may be seized with a lawfully issued search warrant and to take account of a recent Supreme Court decision (*Warden* v. *Haden*, 387 U.S. 294 (1967)) and recent congressional action (18 U.S.C. § 3103a) which authorize the issuance of a search warrant to search for items of solely evidential value. 18 U.S.C. § 3103a provides that "a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense . . . ."

Recent state legislation authorizes the issuance of a search warrant for evidence of crime. See, *e.g.*, Cal. Penal Code § 1524(4) (West Supp. 1968); Ill. Rev. Stat. ch. 38, § 108–3 (1965); LSA C. Cr. P. art. 161 (1967); N.Y. CPL § 690.10(4) (McKinney, 1971); Ore. Rev. Stat. § 141.010 (1969); Wis. Stat. § 968.13(2) (1969).

The general weight of recent text and law review comment has been in favor of allowing a search for evidence. 8 Wigmore, Evidence § 2184a. (McNaughton rev. 1961); Kamisar, The Wiretapping-Eavesdropping Problem: A professor's View, 44 Minn. L. Rev. 891 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif. L. Rev. 474 (1961); Comments: 66 Colum. L. Rev. 355 (1966), 45 N.C.L. Rev. 512 (1967), 20 U. Chi. L. Rev. 319 (1953).

There is no intention to limit the protection of the fifth amendment against compulsory self-incrimination, so items which are solely "testimonial" or "communicative" in nature might well be inadmissible on those grounds. *Schmerber* v. *California*, 384 U.S. 757 (1966). The court referred to the possible fifth amendment limitation in *Warden* v. *Hayden*, *supra:*

This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure. [387 U.S. at 303].

See ALI Model Code of Pre-Arraignment Procedure § 551.03(2) and commentary at pp. 3–5 (April 30, 1971).

It seems preferable to allow the fifth amendment limitation to develop as cases arise rather than attempt to articulate the constitutional doctrine as part of the rule itself.

The amendment to subdivision (c) is intended to make clear that a search warrant may properly be based upon a finding of probable cause based upon hearsay. That a search warrant may properly be issued on the basis of hearsay is current law. See, *e.g.*, *Jones* v. *United States*, 362 U.S. 257 (1960); *Spinelli* v. *United States*, 393 U.S. 410 (1969). See also *State* v. *Beal*, 40 Wis. 2d 607, 162 N.W. 2d 640 (1968), reversing prior Wisconsin cases which held that a search warrant could not properly issue on the basis of hearsay evidence

The provision in subdivision (c) that the magistrate may examine the affiant or witnesses under oath is intended to assure him an opportunity to make a careful decision as to whether there is probable cause. It seems desirable to do this as an incident to the issuance of the warrant rather than having the issue raised only later on a motion to suppress the evidence. See L. Tiffany, D. McIntyre, and D. Rotenberg, Detection of Crime 118 (1967). If testimony is taken it must be recorded, transcribed, and made part of the affidavit or affidavits. This is to insure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if that question should later arise.

The requirement that the warrant itself state the grounds for its issuance and the names of any affiants, is eliminated as unnecessary paper work. There is no comparable requirement for an arrest warrant in rule 4. A person who wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued.

The former requirement that the warrant require that the search be conducted "forthwith" is changed to read "within a specified period of time not to exceed 10 days." The former rule contained an inconsistency between subdivision (c) requiring that the search be conducted "forthwith" and subdivision (d) requiring execution "within 10 days after its date." The amendment resolves this ambiguity and confers discretion upon the issuing magistrate to specify the time within which the search may be conducted to meet the needs of the particular case.

The rule is also changed to allow the magistrate to authorize a search at a time other than "daytime," where there is "reasonable cause shown" for doing so. To make clear what "daytime" means, the term is defined in subdivision (h).

Subdivision (d) is amended to conform its language to the Federal Magistrates Act. The language "The warrant may be executed and returned only within 10 days after its date" is omitted as unnnecessary. The matter is now covered adequately in proposed subdivision (c) which gives the issuing officer authority to fix the time within which the warrant is to be executed.

The amendment to subdivision (e) and the addition of subdivision (f) are intended to require the motion to suppress evidence to be made in the trial court rather than in the district in which the evidence was seized as now allowed by the rule. In *DiBella* v. *United States*, 369 U.S. 121 (1962), the court, in effect, discouraged motions to suppress in the district in which the property was seized:

There is a decision in the Second Circuit, *United States* v. *Klapholz*, 230 F. 2d 494 (1956), allowing the Government an appeal from an order granting a post-indictment motion to suppress, apparently for the single reason that the motion was filed in the district of seizure rather than of trial; but the case was soon thereafter taken by a District Court to have counseled declining jurisdiction of such motions for reasons persuasive against allowing the appeal: "This course will avoid a needless duplication of effort by two courts and provide a more expeditious resolution of the controversy besides avoiding the risk of determining prematurely and inadequately the admissibility of evidence at the trial. . . . A piecemeal adjudication such as that which would necessarily follow from a disposition of the motion here might conceivably result in prejudice either to the Government or the defendants, or both." *United States* v. *Lester*, 21 F.R.D. 30, 31 (D.C.S.D.N.Y. 1957). Rule 41 (e), of course, specifically provides for making of the motion in the district of seizure On a summary hearing, however, the ruling there is likely always to be tentative. We think it accords most satisfactorily with sound administration of the Rules to treat such rulings as interlocutory. [369 U.S. at 132–133.]

As amended, subdivision (e) provides for a return of the property if (1) the person is entitled to lawful possession *and* (2) the seizure was illegal. This means that the judge in the district of seizure does not have to decide the legality of the seizure in cases involving contraband which, even if seized illegally, is not to be returned.

The five grounds for returning the property, presently listed in the rule, are dropped for two reasons—(1) substantive grounds for objecting to illegally obtained evidence (*e.g.*, *Miranda*) are not ordinarily codified in the rules and (2) the categories are not entirely accurate. See *United States* v. *Howard*, 138 F. Supp. 376, 380 (D. Md. 1956).

A sentence is added to subdivision (e) to provide that a motion for return of property, made in the district of trial, shall be treated also as a motion to suppress under rule 12. This change is intended to further the objective of rule 12 which is to have all pretrial motions disposed of in a single court appearance rather than to have a series of pretrial motions made on different dates, causing undue delay in administration.

Subdivision (f) is new and reflects the position that it is best to have the motion to suppress made in the

court of the district of trial rather than in the court of the district in which the seizure occurred. The motion to suppress in the district of trial should be made in accordance with the provisions of rule 12.

Subdivision (g) is changed to conform to subdivision (c) which requires the return to be made before a federal judicial officer even though the search warrant may have been issued by a nonfederal magistrate.

Subdivision (h) is former rule 41(g) with the addition of a definition of the term "daytime" and the phrase "federal law enforcement officer."

X. GENERAL PROVISIONS

Rule 43. Presence of the Defendant

(a) Presence Required.

The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required.

The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) Presence Not Required.

A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94–64, § 3(35), 89 Stat. 376.)

Notes of Advisory Committee on Rules

The revision of rule 43 is designed to reflect Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). In *Allen*, the court held that "there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." 397 U.S. at 343–344, 90 S.Ct. 1057.

Since rule 43 formerly limited trial in absentia to situations in which there is a "voluntary absence after the trial has been commenced," it could be read as precluding a federal judge from exercising the third option held to be constitutionally permissible in *Allen*. The amendment is designed to make clear that the judge does have the power to exclude the defendant from the courtroom when the circumstances warrant such action.

The decision in *Allen*, makes no attempt to spell out standards to guide a judge in selecting the appropriate method to ensure decorum in the courtroom and there is no attempt to do so in the revision of the rule.

The concurring opinion of Mr. Justice Brennan stresses that the trial judge should make a reasonable effort to enable an excluded defendant "to communicate with his attorney and, if possible, to keep apprised of the progress of the trial." 397 U.S. at 351, 90 S.Ct. 1057. The Federal Judicial Center is presently engaged in experimenting with closed circuit television in courtrooms. The experience gained from these experiments may make closed circuit television readily available in federal courtrooms through which an excluded defendant would be able to hear and observe the trial.

The defendant's right to be present during the trial on a capital offense has been said to be so fundamental that it may not be waived. Diaz v. United States, 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500 (1912) (dictum); Near v. Cunningham, 313 F.2d 929, 931 (4th Cir. 1963); C. Wright, Federal Practice and Procedure: Criminal § 723 at 199 (1969, Supp.1971).

However, in Illinois v. Allen, *supra* the court's opinion suggests that sanctions such as contempt may be least effective where the defendant is ultimately facing a far more serious sanction such as the death penalty. 397 U.S. at 345, 90 S.Ct. 1057. The ultimate determination of when a defendant can waive his right to be present in a capital case (assuming a death penalty provision is held constitutional, see Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)) is left for further clarification by the courts.

Subdivision (b)(1) makes clear that voluntary absence may constitute a waiver even if the defendant has not been informed by the court of his obligation to remain during the trial. Of course, proof of voluntary absence will require a showing that the defendant knew of the fact that the trial or other proceeding was going on. C. Wright, Federal Practice and Procedure: Criminal § 723 n. 35 (1969). But it is unnecessary to show that he was specifically warned of his obligation to be present; a warning seldom is thought necessary in current practice. [See Taylor v. United States, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973).]

Subdivision (c)(3) makes clear that the defendant need not be present at a conference held by the court and counsel where the subject of the conference is an issue of law.

The other changes in the rule are editorial in nature. In the last phrase of the first sentence, "these rules" is changed to read "this rule," because there are no references in any of the other rules to situations where the defendant is not required to be present. The phrase "at the time of the plea," is added to subdivision (a) to make perfectly clear that defendant must be present at the time of the plea. See rule 11(c)(5) which provides that the judge may set a time, other than arraignment, for the holding of a plea agreement procedure.

Notes of Committee on the Judiciary, House Report No. 94–247

A. Amendments Proposed by the Supreme Court. Rule 43 of the Federal Rules of Criminal Procedure deals with the presence of the defendant during the proceedings against him. It presently permits a defendant to be tried in absentia only in non-capital cases where the defendant has voluntarily absented himself after the trial has begun.

The Supreme Court amendments provide that a defendant has waived his right to be present at the trial of a capital or noncapital case in two circumstances: (1) when he voluntarily absents himself after the trial has begun; and (2) when he "engages in conduct which is such as to justify his being excluded from the courtroom."

B. Committee Action. The Committee added language to subdivision (b)(2), which deals with excluding a disruptive defendant from the courtroom. The Advisory Committee Note indicates that the rule proposed by the Supreme Court was drafted to reflect the decision in Illinois v. Allen, 397 U.S. 337 (1970). The Committee found that subdivision (b)(2) as proposed did not full track the *Allen* decision. Consequently, language was added to that subsection to require the court to warn a

disruptive defendant before excluding him from the courtroom.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APR. 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974 and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

RULE 44. RIGHT TO AND ASSIGNMENT OF COUNSEL

(a) Right to assigned counsel.

Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment.

(b) Assignment procedure.

The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto. (As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

Subdivision (a) is amended to reflect the Federal Magistrates Act of 1968. The phrase "federal magistrate" is defined in rule 54.

RULE 46. RELEASE FROM CUSTODY

(a) Release prior to trial.

Eligibilty for release prior to trial shall be in accordance with 18 U.S.C. § 3146, § 3148, or § 3149.

(b) Release during trial.

A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not obstruct the orderly and expeditious progress of the trial.

(c) Pending sentence and notice of appeal.

Eligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U.S.C. § 3148. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

(d) Justification of sureties.

Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

(e) Forfeiture.

(1) *Declaration.* If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) *Setting aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) *Enforcement.* When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(f) Exoneration.

When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

(g) Supervision of detention pending trial.

The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of his deposition pursuant to Rule 15(a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody. (As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

The amendments are intended primarily to bring rule 46 into general conformity with the Bail Reform Act of 1966 and to deal in the rule with some issues not now included within the rule.

Subdivision (a) makes explicit that the Bail Reform Act of 1966 controls release on bail prior to trial. 18 U.S.C. § 3146 refers to release of a defendant. 18 U.S.C. § 3149 refers to release of a material witness.

Subdivision (b) deals with an issue not dealt with by the Bail Reform Act of 1966 or explicitly in former rule 46, that is, the issue of bail during trial. The rule gives the trial judge discretion to continue the prior conditions of release or to impose such additional conditions as are adequate to insure presence at trial or to insure that his conduct will not obstruct the orderly and expeditious progress of the trial.

Subdivision (c) provides for release during the period between a conviction and sentencing and for the giving of a notice of appeal or of the expiration of the time allowed for filing notice of appeal. There are situations in which defense counsel may informally indicate an intention to appeal but not actually give notice of appeal for several days. To deal with this situation the rule makes clear that the district court has authority to release under the terms of 18 U.S.C. § 3148 pending notice of

appeal (*e.g.*, during the ten days after entry of judgment; see rule 4(b) of the Rules of Appellate Procedure). After the filing of notice of appeal, release by the district court shall be in accordance with the provisions of rule 9(b) of the Rules of Appellate Procedure. The burden of establishing that grounds for release exist is placed upon the defendant in the view that the fact of conviction justifies retention in custody in situations where doubt exists as to whether a defendant can be safely released pending either sentence or the giving of notice of appeal.

Subdivisions (d), (e), (f), and (g) remain unchanged. They were formerly lettered (e), (f), (g), and (h).

RULE 49. SERVICE AND FILING OF PAPERS

* * * * *

(c) Notice of Orders.

Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure.

* * * * *

CODIFICATION

Subdiv. (c) of Rule 49 is set out in this supplement to correct typographical error in the main edition.

RULE 50. CALENDARS; PLAN FOR PROMPT DISPOSITION

(a) Calendars.

The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable.

(b) Plan for achieving prompt disposition of criminal cases.

To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare a plan for the prompt disposition of criminal cases which shall include rules relating to time limits within which procedures prior to trial, the trial itself, and sentencing must take place, means of reporting the status of cases, and such other matters as are necessary or proper to minimize delay and facilitate the prompt disposition of such cases. The district plan shall include special provision for the prompt disposition of any case in which it appears to the court that there is reason to believe that the pretrial liberty of a particular defendant who is in custody or released pursuant to Rule 46, poses a danger to himself, to any other person, or to the community. The district plan shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of the district court may designate. If approved the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States. The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. Each district court shall submit its plan to the reviewing panel not later than 90 days from the effective date of this rule. (As amended Apr. 24, 1972, eff. Oct. 1, 1972; Mar. 18, 1974, eff. July 1, 1974.)

NOTES OF THE ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

The addition to the rule proposed by subdivision (b) is designed to achieve the more prompt disposition of criminal cases.

Preventing undue delay in the administration of criminal justice has become an object of increasing interest and concern. This is reflected in the Congress. See, e.g., 116 Cong. Rec. S7291–97 (daily ed. May 18, 1970) (remarks of Senator Ervin). Bills have been introduced fixing specific time limits. See S. 3936, H.R. 14822, H.R. 15888, 91st Cong., 2d Sess. (1970).

Proposals for dealing with the problem of delay have also been made by the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967) especially pp. 84–90, and by the American Bar Association Project on Standards for Criminal Justice, Standards Relating to Speedy Trial (Approved Draft, 1968). Both recommend specific time limits for each stage in the criminal process as the most effective way of achieving prompt disposition of criminal cases. See also Note, Nevada's 1967 Criminal Procedure Law from Arrest to Trial: One State's Response to a Widely Recognized Need, 1969 Utah L. Rev. 520, 542 no. 114.

Historically, the right to a speedy trial has been thought of as a protection for the defendant. Delay can cause a hardship to a defendant who is in custody awaiting trial. Even if afforded the opportunity for pretrial release, a defendant nonetheless is likely to suffer anxiety during a period of unwanted delay, and he runs the risk that his memory and those of his witnesses may suffer as time goes on.

Delay can also adversely affect the prosecution. Witnesses may lose interest or disappear or their memories may fade thus making them more vulnerable to cross-examination. See Note, The Right to a Speedy Criminal Trial, 57 Colum. L. Rev. 846 (1957).

There is also a larger public interest in the prompt disposition of criminal cases which may transcend the interest of the particular prosecutor, defense counsel, and defendant. Thus there is need to try to expedite criminal cases even when both prosecution and defense may be willing to agree to a continuance or continuances. It has long been said that it is the certain and prompt imposition of a criminal sanction rather than its severity that has a significant deterring effect upon potential criminal conduct. See Banfield and Anderson, Continuances in the Cook County Criminal Courts, 35 U. Chi. L. Rev. 259, 259–63 (1968).

Providing specific time limits for each stage of the criminal justice system is made difficult, particularly in federal courts, by the widely varying conditions which exist between the very busy urban districts on the one hand and the far less busy rural districts on the other hand. In the former, account must be taken of the extremely heavy caseload, and the prescription of relatively short time limits is realistic only if there is provided additional prosecutorial and judicial manpower. In some rural districts, the availability of a grand jury only twice a year makes unrealistic the provision of short time limits within which an indictment must be returned. This is not to say that prompt disposition of criminal cases cannot be achieved. It means only that the achieving of prompt disposition may require solutions which vary from district to district. Finding the best methods will require innovation and experimentation. To encourage this, the proposed draft mandates each district court to prepare a plan to achieve the prompt disposition of criminal cases in the district. The method prescribed for the development and approval of the district plans is comparable to

that prescribed in the Jury Selection and Service Act of 1968, 28 U.S.C. § 1863(a).

Each plan shall include rules which specify time limts and a means for reporting the status of criminal cases. The appropriate length of the time limits is left to the discretion of the individual district courts. This permits each district court to establish time limits that are appropriate in light of its criminal caseload, frequency of grand jury meetings, and any other factors which affect the progress of criminal actions. Where local conditions exist which contribute to delay, it is contemplated that appropriate efforts will be made to eliminate those conditions. For example, experience in some rural districts demonstrates that grand juries can be kept on call thus eliminating the grand jury as a cause for prolonged delay. Where manpower shortage is a major cause for delay, adequate solutions will require congressional action. But the development and analysis of the district plans should disclose where manpower shortages exist; how large the shortages are; and what is needed, in the way of additional manpower, to achieve the prompt disposition of criminal cases.

The district court plans must contain special provision for prompt disposition of cases in which there is reason to believe that the pretrial liberty of a defendant poses danger to himself, to any other person, or to the community. Prompt disposition of criminal cases may provide an alternative to the pretrial detention of potentially dangerous defendants. See 116 Cong. Rec. S7291–97 (daily ed. May 18, 1970) (remarks of Senator Ervin). Prompt disposition of criminal cases in which the defendant is held in pretrial detention would ensure that the deprivation of liberty prior to conviction would be minimized.

Approval of the original plan and any subsequent modification must be obtained from a reviewing panel made up of one judge from the district submitting the plan (either the chief judge or another active judge appointed by him) and the members of the judicial council of the circuit. The makeup of this reviewing panel is the same as that provided by the Jury Selection and Service Act of 1968, 28 U.S.C. § 1863(a). This reviewing panel is also empowered to direct the modification of a district court plan.

The Circuit Court of Appeals for the Second Circuit recently adopted a set of rules for the prompt disposition of criminal cases. See 8 Cr. L. 2251 (Jan. 13, 1971). These rules, effective July 5, 1971, provide time limits for the early trial of high risk defendants, for court control over the granting of continuances, for criteria to control continuance practice, and for sanction against the prosecution or defense in the event of noncompliance with prescribed time limits.

Rule 54. Application and Exception

(a) Courts.

These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone Code) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that all offenses shall continue to be prosecuted in the District Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury.

(b) Proceedings.

(1) *Removed proceedings.* These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) *Offenses outside a district or State.* These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238.

(3) *Peace bonds.* These rules do not alter the power of judges of the United States or of United States magistrates to hold to security of the peace and for good behavior under 18 U.S.C. § 3043, and under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) *Proceedings before United States magistrates.* Proceedings involving minor offenses before United States magistrates, as defined in subdivision (c) of this rule, are governed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates.

(5) *Other proceedings.* These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C., Chapter 403—Juvenile Delinquency—so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300–4305, 33 U.S.C. §§ 391–396, or to proceedings involving disputes between seamen under Revised Statutes, §§ 4079–4081, as amended, 22 U.S.C. §§ 256–258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325–327, 16 U.S.C. §§ 772–772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.

(c) Application of terms.

As used in these rules the following terms have the designated meanings.

"Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in an insular possession.

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, and authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein.

"Civil action" refers to a civil action in a district court.

The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

"District court" includes all district courts named in subdivision (a) of this rule.

"Federal magistrate" means a United States magistrate as defined in 28 U.S.C. §§ 631–639, a judge of the United States or another judge or judicial official specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia,

to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of a district court, court of appeals, or the Supreme Court.

"Law" includes statutes and judicial decisions.

"Magistrate" includes a United States magistrate as defined in 28 U.S.C. §§ 631–639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5.

"Minor offense" is defined in 18 U.S.C. § 3401.

"Oath" includes affirmations.

"Petty offense" is defined in 18 U.S.C. § 1(3).

"State" includes District of Columbia, Puerto Rico, territory and insular possession.

"United States magistrate" means the officer authorized by 28 U.S.C. §§ 631–639. (As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

1972 AMENDMENT

Subdivisions (a) and (b) are amended to delete the references to "commissioners" and to substitute, where appropriate, the phrase "United States magistrates."

Subdivision (a)(2) is deleted. In its old form it makes reference to "rules applicable to criminal proceedings before commissioners," which are now replaced by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates (1971). Rule 1 of the magistrates' rules provides that they are applicable to cases involving "minor offenses" as defined in 18 U.S.C. § 3401 "before United States magistrates." Cases involving "minor offenses" brought before a judge of the district court will be governed by the Rules of Criminal Procedure for the United States District Courts.

The last sentence of old subdivision (a)(2) is stricken for two reasons: (1) Whenever possible, cases should be brought before a United States magistrate rather than before a state or local judicial officer authorized by 18 U.S.C. § 3041. (2) When a state or local judicial officer is involved, he should conform to the federal rules.

Subdivision (b)(4) makes clear that minor offense cases before United States magistrates are governed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates (1971). See rule 1 of the magistrates' rules.

In subdivision (b)(5) the word "civil" is added before the word "forfeiture" to make clear that the rules *do* apply to criminal forfeitures. This is clearly the intention of Congress. See Senate Report No. 91–617, 91st Cong., 1st Sess., Dec. 16, 1969, at 160:

Subsection (a) provides the remedy of criminal forfeiture. Forfeiture trials are to be governed by the Fed. R. Crim. P. But see Fed. R. Crim. P. 54(b)(5).

Subdivision (c) is amended to list the defined terms in alphabetical order to facilitate the use of the rule. There are added six new definitions.

"Federal magistrate" is a phrase to be used whenever the rule is intended to confer authority on any federal judicial officer including a United States magistrate.

"Judge of the United States" is a phrase defined to include district court, court of appeals, and supreme court judges. It is used in the rules to indicate that only a judge (not to include a United States magistrate) is authorized to act.

"Magistrate" is a term used when both federal and state judicial officers may be authorized to act. The scope of authority of state or local judicial officers is clarified by the enumeration of those rules (3, 4, and 5) under which they are authorized to act.

"United States magistrate" is a phrase which refers to the federal judicial officer created by the Federal Magistrates Act (28 U.S.C. §§ 631–639).

Also added are cross references to the statutory definitions of "minor offense" and "petty offense."

RULE 55. RECORDS

The clerk of the district court and each United States magistrate shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, may prescribe. Among the records required to be kept by the clerk shall be a book known as the "criminal docket" in which, among other things, shall be entered each order or judgment of the court. The entry of an order or judgment shall show the date the entry is made. (As amended Apr. 24, 1972, eff. Oct. 1, 1972.)